No. 90-1029-CFX
Status: GRANTED

Title: Eastman Kodak Company, Petitioner
v.
Image Technical Services, Inc., et al.

Docketed:
December 20, 1990

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Pickett,Donn P., Melchior,Kurt W.

Counsel for respondent: Hennefer,James A.

NOTE: See mail label re dkt dt

Entry	Date	Note	Proceedings and Orders
1	Dec 20 1990	G	Petition for writ of certiorari filed.
2	Jan 18 1991		Brief amici curiae of Digital Equipment Corp., et al. filed.
3	Jan 22 1991	G	Motion of Computer and Business Equipment Manufacturers Association for leave to file a brief as amicus curiae filed.
4	Jan 22 1991		Brief of respondents Image Technical Service, Inc., et al. in opposition filed.
5	Jan 30 1991		DISTRIBUTED. February 15, 1991
6	Feb 19 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
7	May 22 1991		Brief amicus curiae of United States filed.
8	May 28 1991		REDISTRIBUTED. June 13, 1991
9	Jun 10 1991	X	Supplemental brief of respondents Image Technical Service, Ind., et al. filed.
10	Jun 17 1991		Motion of Computer and Business Equipment Manufacturers Association for leave to file a brief as amicus curiae GRANTED.
11	Jun 17 1991		Petition GRANTED.
			**********
12	Jul 31 1991		Appendix of petitioner filed.
		*	Joint Appendix in 4 Volumes.
13	Jul 31 1991		Brief of petitioner Eastman Kodak filed.
14	Aug 1 1991		Brief amici curiae of Motor Vehicle Manufacturers Assn of the United States, et al filed.
15	Aug 1 1991		Brief amicus curiae of Computer and Business Equipment Manufacturers Assn. filed.
16	Aug 1 1991		Brief amicus curiae of United States filed.
17	Aug 1 1991		12 copies of lodging received. Box.
18	Aug 1 1991		Brief amicus curiae of National Electrical Manufacturers Association filed.
21	Aug 1 1991		Brief amicus curiae of Digital Equipment Corporation, et al. filed.
20	Aug 6 1991		Order extending time to file brief of respondent on the merits until September 20, 1991.
22	Aug 9 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
35	Sep 10 1991		Brief amicus curiae of Public Citizen filed.
33	Sep 19 1991		Brief amici curiae of National Office Machine Dealers, et al. filed.

No. 90-1029-CFX

Entry	Date	Note	Proceedings and Orders
23	Sep 20 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Sep 20 1991		Lodging received. 9 copies.
26	Sep 20 1991		Brief amici curiae of Ohio, et al. filed.
27	Sep 20 1991		Brief amici curiae of National Association of State Purchasing Officials, et al. filed.
28	Sep 20 1991		Brief amici curiae of California State Electronics Assn., et al. filed.
29	Sep 20 1991		Brief amicus curiae of National Electronics Sales and Service Dealers filed.
30	Sep 20 1991		Brief amici curiae of State Farm Mutual Automobile Insurance Co.,et al. filed.
31	Sep 20 1991		Brief amicus curiae of National Retail Federation filed.
32	Sep 20 1991		Brief amicus curiae of Grumman Corporation filed.
34	Sep 20 1991		Brief amici curiae of Automotive Warehouse Distributors, et al. filed.
36	Sep 20 1991		Brief amicus curiae of Bell Atlantic Business Systems Services, Inc. filed.
37	Sep 20 1991		Brief of respondents Image Technical Service, Inc., et al. filed.
38	Sep 20 1991		Brief amicus curiae of Computer Service Network filed.
25	Sep 23 1991		18 copies of lodging received.
39	Oct 11 1991		CIRCULATED.
40	Oct 15 1991		SET FOR ARGUMENT TUESDAY, DECEMBER 10, 1991. (1ST CASE)
42	Oct 21 1991	X	Reply brief of petitioner Eastman Kodak filed.
41	Oct 24 1991		Record filed.
		*	Certified proceedings and briefs, United States Court ofAppeals, Ninth Circuit.
43	Dec 6 1991		Record filed.
		*	Original record U.S. District Court, Northern Dist. of California, 3 Folders, 1 SEALED Folder
44	Dec 10 1991		ARGUED.

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CLERK

In The

Supreme Court of the United States

October Term, 1990

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, d/b/a G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, d/b/a MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO, LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Petitioner Eastman Kodak Company manufactures, markets and services business copiers and micrographics equipment. It concededly lacks market power in those highly competitive interbrand equipment markets. Respondents are 18 independent service organizations ("ISOs") which service Kodak equipment. Unilaterally Kodak chooses not to sell replacement parts to ISOs. Respondents refuse to develop their own available supply sources. They define single brand markets, limited to Kodak parts or service of Kodak equipment, and claim Kodak's practice is both a *per se* tying violation and unlawful monopolization. Judge Schwarzer granted summary judgment in favor of Kodak. The Ninth Circuit (Judge Wallace dissenting) reversed.

This petition presents the following questions:

1. Does a vertically-integrated equipment manufacturer that lacks market power in fiercely competitive interbrand equipment markets violate the Sherman Act by declining to sell replacement parts to ISOs?

2. Can respondents properly base their *per se* tying claim on the alleged tying of two single brand aftermarkets (tying Kodak service to Kodak parts) which are wholly derivative of a competitive interbrand market?

3. Does speculation about unspecified market imperfections constitute the "more persuasive evidence" required under *Matsushita* to defeat summary judgment in an economically implausible antitrust case?

QUESTIONS PRESENTED – continued

4. If a manufacturer has no interbrand market power and has legitimate business justifications for not selling parts to service competitors, can it monopolize a market limited to service of its own equipment or can its parts constitute an essential facility?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the lower court. Petitioner Eastman Kodak Company has no parent corporation. Kodak's subsidiaries, other than wholly owned subsidiaries, are listed below:

Actiphoto, LDA
Bellevue Photo S.A.R.L.
City Photo Limited
Consumer Developments Ltd.
Dainichiseika-Sterling Co., Ltd.
Ditram S.A.R.L.
India Photographic Company Limited
Inrock Chemical Co., Ltd.
K.K. Big Color Service
K.K. East West
K.K. Hiyama Photo Studio
K.K. IS Photo
K.K. Joy
K.K. Kyohai
K.K. Nihonbashi Pro Color
K.K. Qualte
K.K. Technicolor Angel
K.K. Tokyo Color Shizuoka Lab
K.K. Yokohama Lab
Kodak & H-Color De Forenende Fotolabortorier A/S
Kodak Imagica K.K.
Kodak Japan Ltd.
Kodak Korea Limited
Kodak Lab Chiba K.K.
Kodak Medical Ltd.
Les Laboratories Photographiques de France S.A.
LK-TEL Video S.A.
Mackwoods-Wintrop Ltd.
Miller Bros. Hall & Company Limited
Meubles Andes S.A.
Nippon System House Co., Ltd.

LIST OF PARTIES AND RULE 29.1 LIST – continued

P.T. Sterling Products Indonesia
Photo Finishers (Glasgow) Limited
Quick Processing Industries (UK) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Sterling Drug Korea Ltd.
Sterling Drug (Malaya) Sdn. Bhd.
Sterling Farmaceutica Portuguesa Lda.
Sterling Products (Ghana) Ltd.
Sterling Products (Nigeria) Ltd.
Sterling Products Pakistan (Private) Ltd.
Sterling Yamanouchi Pharmaceutical Inc.
Taylors Developing & Printing Works Limited
Videoplex, Lda.
Y.K. Kamata Pro Photo
Yamagata Taigyo, Ltd.
Winster Pharmaceuticals Ltd.

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No. 90-

In The

Supreme Court of the United States

October Term, 1990

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, d/b/a G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, d/b/a MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO, LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 903 F.2d 612 (9th Cir. 1990). It is reprinted in the appendix

("App.") at 1A-28A. The district court's unpublished opinion and order granting Kodak's motion for summary judgment is reprinted at App. 29B-38B. The court of appeals' order denying Kodak's petition for rehearing is not reported and is reprinted at App. 39C-40C.

JURISDICTION

The court of appeals entered judgment on May 1, 1990. It denied a timely petition for rehearing on September 21, 1990. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are 15 U.S.C. §§ 1 and 2. They are set out verbatim at App. 41D.

STATEMENT OF THE CASE

A. The Parties and the Market Setting

1. Kodak's place in the interbrand equipment markets

Kodak makes and sells complex business machines, specifically, photocopiers and micrographics equipment. It faces fierce competition in the interbrand markets for that equipment. Kodak's competitors are large American and Japanese corporations, including Xerox, Savin, Canon, Ricoh, and Minolta (as to copiers) and Bell & Howell, 3M, Canon and Minolta (as to micrographics). Respondents, and the court of appeals, concede that Kodak is not a monopolist and does not have market power in the interbrand copier and micrographics markets. App. 8A n.3.

Kodak's lack of market power extends to any alleged derivative aftermarkets for Kodak parts or service. It is

undisputed that, in making purchases, the sophisticated buyers of business copiers and micrographics equipment consider service and dependability as part of the total cost and value of a system. App. 20A. Thus, if Kodak charges supercompetitive prices for either parts or service, its total system will be too expensive and businesses will simply buy another manufacturer's machines.

Kodak's policy of providing the highest quality service for its machines is highly procompetitive. Service and dependability are vitally important to those who buy Kodak's machines. Kodak has emphasized the high quality and dependability of both its equipment and its supporting service organization. Kodak's efforts have succeeded: industry surveys have consistently rated Kodak's service the best and Kodak's equipment the most dependable. Understandably Kodak touts this service advantage to compete against other equipment suppliers.

Kodak's practice of not selling parts to ISOs is an essential part of that overall business strategy. Kodak's strategy has proved advantageous, both to it and its customers. It has enabled Kodak to provide customers with more choices where they really count – in the market for business machinery itself. Thus, Kodak's innovation and investment have led to its success and to greater choice in the interbrand markets.

2. Independent service organizations

In contrast to Kodak, respondents make nothing, offer no innovations, and have invested little, if anything. Respondents are 18 independent service organizations ("ISOs") located in ten different states. ISOs began offering service on Kodak equipment in 1982. They exist for the undisguised purpose of taking service customers and revenues away from Kodak. Yet they insist that Kodak must aid them in this effort by maintaining inventories

and selling them Kodak parts (defined as tools, test equipment, supplies and service manuals). There is no evidence that respondents could not obtain their own parts, either by making them or by cannibalizing used equipment.[1] Nor is there evidence of entry barriers to making parts; in fact, many competitors, including Kodak, have recently entered the far more complex equipment markets.

B. Kodak's Practices and the Reasons for Them

Kodak sells parts to its equipment owners if they use Kodak service or if they service equipment themselves. Kodak unilaterally chooses not to sell to ISOs.[2] There are three main reasons for these practices: (1) to promote interbrand equipment competition by allowing Kodak to stress its renowned service commitment; (2) to reduce Kodak's inventory costs by not stocking parts for ISOs; and (3) to prevent ISOs from freeriding on Kodak's investment in copier and micrographics equipment, parts and service.

---

[1] In addition to those two sources, respondents can buy most Kodak parts directly from others. Respondents claim that 90% of all Kodak replacement parts are made outside Kodak. They concede that many parts can be bought from OEM's, but complain that in a few specific instances they cannot.

[2] Kodak established its parts practice for copiers at the time it entered that business in 1975. Kodak sold micrographics parts to anyone before it adopted a new program in 1985. It continues to sell ISOs parts for micrographics equipment introduced before 1985.

1. Promoting interbrand competition

In marketing its products, Kodak stresses its commitment to outstanding service. Indeed, the relationship of service to the underlying equipment offering was central to Kodak's decisions to adopt the challenged parts practices. Kodak determined that it could best maintain high quality service with direct quality control measures. Thus, it decided not to sponsor independent, and potentially inferior, service organizations by offering them parts. Maintaining outstanding service enhances Kodak's ability to compete with Xerox, Canon and the other manufacturers.

The parts practices also avoid damage to Kodak's relationship with its equipment customers. This happens in two ways. First, when an ISO has displaced Kodak, Kodak loses the day-to-day contact that is crucial to keeping its customer satisfied and learning of potential new sales opportunities. Even more important, divided responsibility inevitably leads to "finger-pointing" whenever an ISO cannot repair a problem. Kodak is blamed, even if the problem is the result of improper diagnosis, maintenance or repair. Kodak has no opportunity to respond; it may never even hear of the problem. But the customer's image of Kodak is tarnished and that hurts Kodak when the customer has future equipment needs. Kodak does not want to encourage even the possibility of that happening by fostering the efforts of ISOs.

2. Reducing inventories

A second reason for the parts practices is to reduce Kodak's parts inventories and thereby to reduce Kodak's costs. In early 1985, Kodak had over $16 million of micrographic equipment parts in stock. As a company-wide effort to improve its asset management, Kodak began looking for ways to reduce its parts inventory. One way

was to stop making, buying and stocking parts for the benefit of ISOs.

3. Not supporting freeriding

Respondents claim a right to freeride. That is, they want to hurt Kodak, by taking its service revenues, in direct reliance on Kodak's support, in selling them parts. Kodak does not want to support freeriding. Because Kodak must compete against the likes of Xerox, 3M, Bell and Howell and the ever increasing number of Japanese firms, it is challenge enough for Kodak to make an adequate return on its total investments in the copier and micrographics industries. As freeriders, respondents seek to force Kodak to help them divert Kodak's service revenues, an important part of the total return on those investments. Kodak should not be forced to harm itself by promoting the activities of freeriders such as respondents.

C. Course of Proceedings and Disposition Below

The district court for the Northern District of California, the Honorable William W. Schwarzer presiding, granted Kodak's motion for summary judgment on respondents' *per se* tying and monopolization claims.

The Ninth Circuit, in an opinion by the Honorable Charles E. Wiggins, with a dissent by the Honorable Clifford J. Wallace, reversed Judge Schwarzer's ruling. As to the *per se* tying claim, the majority acknowledged that Kodak does not have market power in the interbrand equipment markets. App. 8A n.3. The majority also conceded that interbrand competition "might prevent Kodak from possessing power in the [Kodak] parts market," that "equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts," and that Kodak's "desire to attract new

customers might, therefore, keep it from charging supercompetitive prices for service." App. 8A-9A.

Nonetheless, the majority dismissed Judge Schwarzer's ruling as resting on a "theoretical basis." App. 10A. It concluded that Kodak might have market power in the intrabrand parts market, despite respondents' concession that Kodak lacked interbrand power, because "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id.* Neither respondents nor the majority identified any market imperfections, and there is no evidence of imperfections. The majority held that respondents did not have to identify specific market imperfections or conduct "a market analysis," because "a requirement that they do so in order to withstand summary judgment would elevate theory over reality." *Id.* Accordingly, it allowed respondents' admittedly implausible claim and found a triable issue of fact existed as to whether Kodak had market power in a market limited to Kodak brand parts.

The majority also reversed Judge Schwarzer's grant of summary judgment as to respondents' section 2 monopolization claim. It found that the relevant market could be limited to the aftermarket for service of Kodak brand equipment and that Kodak might have monopoly power in that single-brand "market." App. 19A. Once again, the majority found "logical appeal" in Kodak's claim that it could not have monopoly power in any aftermarket because it lacked interbrand market power. *Id.* But the court deemed itself unable to "say that this theory mirrors reality," despite the absence of evidence to the contrary. *Id.* The majority then dismissed Kodak's undisputed evidence of the quality control business justification as conceivably "pretextual" and not "genuine." App. 18A.

Judge Wallace dissented. As to respondents' *per se* tying claim, Judge Wallace noted Kodak's inability to exert market power over parts in the face of vigorous interbrand competition:

> Applying Judge Posner's analysis in [*Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228 (7th Cir. 1988),] competition in the interbrand market dictates a simple choice: Kodak may either price parts competitively and maintain its interbrand market share, or it may price parts supercompetitively – yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case, Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. The result would be "a brief perturbation in competitive conditions – not the sort of thing the antitrust laws do or should worry about." *Sterling*, 866 F.2d at 236 (Posner, J., dissenting).

App. 23A. As Judge Wallace succinctly noted, "the majority's holding is tenable only if power in the interbrand market is not relevant to power in the derivative market." App. 24A.

As to respondents' monopolization claim, Judge Wallace noted that Kodak had presented evidence of "its quality-of-service strategy" which was not contradicted by respondents and that "*[a]ny* business justification – whether or not it is the least restrictive – will defeat an attempt-to-monopolize claim." App. 26A, 27A. Thus, even if Kodak's practices were motivated in part by a desire to monopolize, Kodak's legitimate business justifications mandated summary judgment as to respondents' section 2 claims.

REASONS FOR GRANTING THE WRIT

Summary of Argument

This petition raises important issues of federal law: (1) whether a vertically-integrated equipment supplier, which has no interbrand market power, may nevertheless have market power over its own brand of parts, and (2) whether that supplier can monopolize a market limited to service of its own equipment despite undisputed evidence of a legitimate business justification. The court below held that Kodak's unilateral refusal to sell replacement parts to service competitors may give rise to a *per se* tying claim and a claim for monopolization. Its decision controverts this Court's decisions in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), other appellate decisions on point and the economic and competitive realities underlying the Sherman Act.

Respondents claim that Kodak improperly ties Kodak parts to Kodak service and monopolizes markets limited to service of Kodak brand copiers and micrographics equipment. But they concede, first, that Kodak lacks market power in the primary interbrand equipment markets and, second, that businesses buy Kodak equipment based on the total systems cost, including the cost of parts and service. Those concessions are fatal to their case.

Because Kodak lacks market power in the interbrand equipment markets, it cannot charge supercompetitive prices in the service or parts aftermarkets. If Kodak raised its parts or service prices above competitive levels, businesses would simply stop buying Kodak equipment. In short, due to fierce competition in the interbrand equipment markets, Kodak has no market power and no ability to act anticompetitively in any derivative parts or service aftermarket.

All three members of the Ninth Circuit panel accepted the logic of Kodak's position. But the majority held that something "short of actual market power" plus some unspecified "market imperfections" might create market power in a "market" limited to Kodak brand parts. App. 12A. The majority's speculation about unidentified market imperfections misapplies *Jefferson Parish's* requirement of actual market power in all tying cases. It also contradicts *Matsushita* which requires plaintiffs who bring implausible claims – ones that simply make no economic sense – to present "more persuasive evidence" to defeat summary judgment. Here, there is no evidence, let alone persuasive evidence, that Kodak has an ability to harm competition in any relevant market.

The majority had "more trouble" with respondents' monopolization claim, but again reversed summary judgment. App. 18A-19A. It concluded that Kodak might have *monopoly* power in a market for service of Kodak brand equipment. It rejected Kodak's undisputed evidence that its parts practices were at least in part justified by a high quality service strategy. It found that Kodak brand parts could be an "essential" facility, citing *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). The majority again misread this Court's decisions and extended the essential facility doctrine beyond recognition.

Resolution of the issues raised by the petition is critical to manufacturers in high technology industries. As equipment and its maintenance have become more sophisticated, manufacturers have placed various restrictions on the sale of their replacement parts to enhance high quality service and equipment dependability. Until now the law allowed unilateral refusals to sell parts to

independent service organizations. This is the first appellate decision to rule otherwise. But a dozen cases in eight Circuits are now considering virtually identical market definition and power issues, and the preliminary results are confusing and wildly inconsistent. Developers of high technology equipment need the certainty of law that only a decision of this Court can provide.

Prompt resolution of these issues is particularly urgent due to the chilling impact of the decision below on procompetitive innovation. Until now manufacturers have been free to market their systems with a variety of innovative approaches to the provision of parts and service. A manufacturer's ability to innovate, and to succeed in competitive interbrand markets, is enhanced by its freedom to develop parts and service strategies that improve its total systems offerings. The decision below threatens that freedom. If the decision is allowed to stand, potential innovators will have less incentive to develop equipment offerings for fear that their efforts to promote interbrand competition will subject them to treble damage actions at the hands of intrabrand competitors.

In an effort to cast their case as procompetitive, respondents ignore interbrand competition. They accuse Kodak of implausible conduct that at best impacts only single brand "markets" and that would be suicidal to Kodak's interbrand offerings. The real effect of the decision below is to help only respondents, not competition. Respondents simply want the unfettered right to buy parts from Kodak in order to siphon off service revenues from Kodak. They are unwilling (although not unable) to devote resources to develop repair parts or to compete with Kodak head on. If allowed to succeed, freeriding firms like respondents will inevitably discourage innovation and competition.

To correct the Ninth Circuit's serious legal errors in this area of vital importance to high technology industries, this Court should grant the petition and reverse the decision below.

I. The Court of Appeals' Decision Presents Significant Questions About the Application of the Antitrust Laws in Numerous High Technology Industries.

Until now the law uniformly protected, as unilateral refusals to deal, manufacturers' refusals to sell replacement parts so long as the interbrand equipment market was competitive. For example, in *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972), the Ninth Circuit affirmed summary judgment on section 1 and 2 claims against a plaintiff who wanted to obtain parts to service Stenocord dictating machines. It ruled that an antitrust claim would not lie unless the plaintiff could establish an interbrand equipment monopoly: in its words, "total market dominance – as distinguished from 'brand' monopoly." *Id.* at 120. *See also Nobel Scientific Industries, Inc. v. Beckman Instruments, Inc.*, 831 F.2d 537 (4th Cir. 1987), *aff'g and adopting* 670 F. Supp. 1312, 1321 (D. Md. 1986), *cert. denied*, 487 U.S. 1226 (1988); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1337-38 (9th Cir. 1983); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 282 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979).

Recently, a rash of cases has reached the lower courts with new tying and monopolization claims. Each challenges a manufacturer's unilateral restriction on parts or some other derivative product. Each raises the same market power and market definition issues – specifically, whether interbrand competition permits market power

over or a market definition limited to intrabrand parts or service.

This case is the first appellate decision to allow a single brand market definition. But it is only the first of many coming this way. There are a dozen other pending cases in the computer, medical equipment and printing equipment industries that involve identical issues. These cases, listed at App. 42E-43E, are scattered throughout the country in the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits. As the following examples demonstrate, considerable confusion about these issues has arisen with completely inconsistent results:

- In this case, the district court entered summary judgment in favor of defendant, but the Ninth Circuit reversed, with one judge dissenting.
- In *HyPoint*, the district court entered a preliminary injunction against defendant, concluding that the plaintiff had raised serious questions on the merits. The Sixth Circuit, vacated the preliminary injunction, stating that the record failed to reveal any serious question of an antitrust violation. Later, the district court refused even to consider defendant's summary judgment motion, and a jury entered a $1,500,000 verdict (after trebling) for plaintiff. Defendant's appeal is pending.
- In *Virtual Maintenance*, a jury entered a verdict of approximately $25,000,000 (after trebling) for plaintiff, while in *Datagate*, the district court entered summary judgment for defendant and in *Allen-Myland*, the district court entered judgment for defendant following a bench trial. Appeals in all three cases are pending.
- In *Service & Training*, the district court initially entered summary judgment for defendant on monopoly power grounds, but then

> vacated that order. It later reinstated summary judgment on the plaintiff's tying claim, but not the monopolization claim.

Given this new period of confusion and uncertainty, businesses in high technology industries cannot make sound decisions about their service offerings or innovative equipment development. This Court's prompt intervention is required to confirm the freedom to select marketing strategies in competitive equipment markets and set the law straight in this important area.

II. The Court of Appeals' Decision on Respondents' *Per Se* Tying Claim Conflicts with This Court's Decisions In *Jefferson Parish* and *Matsushita* and Is Contrary to Economic Logic and Antitrust Policy.

The decision below is contrary to this Court's rulings in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and other decisions in the First, Sixth and Ninth Circuits. It relies on improper single brand markets and makes no economic or antitrust sense.

A. The Decision Below Conflicts With This Court's Decision in *Jefferson Parish*.

The decision below rests on the proposition that a manufacturer can be liable for treble damages despite a conceded lack of market power in any market other than alleged aftermarkets for parts and service of its own brand of equipment. This single-brand "aftermarket power" theory is contrary to a long line of authority, reaffirmed by this Court in *Jefferson Parish*, holding that there can be no tying violation in the absence of actual market power.

The decision's conflict with *Jefferson Parish* is clear. The majority in *Jefferson Parish* resolved the debate with

those who would overturn *per se* tying entirely[3] by requiring actual market power: "we have condemned tying arrangements when the seller has some special ability – usually called 'market power' – to force a purchaser to do something that he would not do in a competitive market." 466 U.S. at 13-14. The market power requirement is not an empty one. As Judge Posner and Judge Wallace have noted, without market power, supercompetitive pricing of derivative products is necessarily a short-term, Pyrrhic strategy. As Judge Wallace put it:

> I do not see how Kodak could have any market power in the market for replacement parts. If Kodak attempts to increase the price of replacement parts above the competitive level, new buyers will increase their estimates of the total price (including parts and service) of a Kodak copier. If some current Kodak owners are unwilling to scrap their copiers and buy new ones from other manufacturers, Kodak will gain short-run profits from the sale of parts. However, as new buyers switch brands, Kodak will lose market share in the sales of new copiers, to its long-term disadvantage.

App. 20A-21A.

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[3] *Jefferson Parish* is this Court's most recent treatment of tying claims. Although the Court divided 5-4 over whether tying is unlawful *per se*, all Justices agreed that the hospital's restriction of available anesthesiologists was lawful. *Per se* treatment reflects a conviction that the suspect practice is so likely to result in anticompetitive effects that the parties and the court need not engage in lengthy market analysis. *Per se* analysis is particularly inappropriate here. In fact, this Court has twice refused to extend *per se* illegality to certain vertical restraints at least in part due to its conclusion that "interbrand competition . . . provides a significant check on the exploitation of intrabrand market power. . . . " *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n. 19 (1977). *Accord Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 725 (1988).

The majority did not dispute this logic. Instead, just as the Fifth Circuit had done in *Jefferson Parish*,[4] it simply stated that normal economic reasoning should not apply. Purporting to rely on *Jefferson Parish*, it determined that "[s]ome strength . . . short of actual market power . . . combin[ed] with other factors" was sufficient. App. 12A. Specifically, it held that a market share of not more than 23% plus unspecified, speculative market imperfections created a triable issue as to market power. *Id.*

The majority's analysis turns *Jefferson Parish* on its head. *Jefferson Parish* held that evidence of specific, verified market imperfections in a unique market, combined with a 30% market share in the tying product, was insufficient to create market power. "While these factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying." 466 U.S. at 27. Thus, speculative inferences about unidentified market imperfections, even in combination with significant market share, cannot be enough to support a *per se* tying claim.

The majority's "market imperfections" analysis was based on the Ninth Circuit's own questionable decision in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1342 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). The decision below, combined with *Digidyne*, exacerbates the Ninth Circuit's conflict with *Jefferson Parish*.

To find a substitute for actual market power, the majority relied on *Digidyne* and held that Kodak may enjoy market power because its existing customers were allegedly "locked-in" to Kodak brand products. App. 11A ("some owners of large Kodak equipment packages will

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[4] *Compare Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286, 290 (5th Cir. 1982), which this Court overruled, *with* App. 10A.

pay higher prices for Kodak service rather than switch to competitors' systems"). Prior to this case, *Digidyne* stood alone in supporting such a "lock-in" theory of market power. The lock-in theory has been repeatedly rejected by other courts, and is contrary to antitrust and economic logic.[5] It does not and cannot eliminate the impact of Kodak's lack of interbrand market power. In the long run, Kodak must attract new equipment purchasers and therefore must price parts and service competitively.

Digidyne has been expressly rejected by several courts. *See. e.g., A.I. Root Co. v, Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986). Another panel of the Ninth Circuit criticized and narrowly interpreted *Digidyne* in *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 n.4 (9th Cir. 1987). Moreover, Justices White and Blackmun of this Court would have granted certiorari in *Digidyne* to address, among other issues, "what constitutes forcing power in the absence of a large share of the general market" and "whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase." *Data General Corp. v. Digidyne Corp.*, 473 U.S. 908 (1985) (White, J. and Blackmun, J., dissenting from denial of certiorari).

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[5] *See, e.g., General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 975 (9th Cir. 1983); *Kaplan v. Burroughs Corp.*, 611 F.2d 286 293-95 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 917 (10th Cir.), *cert. dism'd*, 423 U.S. 802 (1975). As the United States argued, in an *amicus curiae* brief urging the Court to grant certiorari in *Digidyne*, the lock-in theory improperly focuses only on a customer's post-purchase alternatives. Brief for the United States as *Amicus Curaie* at 14-17, *Data General Corp. v. Digidyne Corp.*, No. 84-761 (May 1985).

Digidyne should not be extended. This case presents the Court with a significant opportunity to preserve the market power requirement of *Jefferson Parish* and prevent the stifling effects of the Ninth Circuit's expansive "market imperfections/lock-in" theory.

B. The Decision Below Conflicts with Other Decisions of the First, Sixth and Ninth Circuits.

The decision below is the first to reject the logic that interbrand competition necessarily precludes market power in derivative aftermarkets. The decision conflicts with decisions of the First and Sixth Circuits and even with prior Ninth Circuit authority.

The First Circuit held in *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.) that an automobile manufacturer's lack of interbrand market power mandated a finding that the manufacturer had no market power over spare parts for its automobiles. Likewise, the Sixth Circuit, in *A.I. Root Co.*, 806 F.2d at 675, held that a computer hardware supplier's lack of interbrand market power precluded any market power over an alleged derivative market for software for its computers.[6] *See also Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 234-37 (7th Cir. 1988) (Posner, J., dissenting), *cert. denied*, 110 S. Ct. 141 (1989).

The decision below also conflicts directly with the Ninth Circuit's own decision in *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir.

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[6] Many other courts have reached the same result by rejecting proposed submarkets limited to a single-brand product or its components. *See, e.g., Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622, 623-24 (1st Cir. 1984); *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 571 (6th Cir. 1981); *Mozart*, 833 F.2d at 1346-47.

1983). There, the Ninth Circuit found that, as a matter of law, interbrand equipment competition precluded the exercise of market power in an alleged derivative aftermarket for Philips magnetic ledger cards ("mlcs"). The court rejected the notion

> that a manufacturer, facing competition against which it cannot prevail in the sale of its end product, could be found to monopolize the market for each unique component that goes into the product. This is surely to lose sight of the forest because of fascination with the trees.

699 F.2d at 975. It concluded that the derivative aftermarket "cannot be separated from the general market" for Philips' equipment. *Id.* at 972. The Ninth Circuit's reasoning presaged that later espoused by Judges Wallace and Posner:

> Philips had little or no power to raise the price of its mlcs without reducing its profits because any such increase would diminish sales of its computer system and very likely adversely affect aggregate profits.

699 F.2d at 972.

The majority's attempt to distinguish these cases fails. It relied on the fact that in cases such as *Grappone*, the tying product was equipment, rather than replacement parts:

> In those cases, since equipment was the tying product, inter-brand competition in the equipment market readily negated the plaintiffs' claims that the defendants possessed power in the tying product market.

App. 8A-9A. That fact does not distinguish this case. Kodak has no more market power over its parts or service than Subaru or Mercedes-Benz (*see Mozart*, 833 F.2d at 1346-47) had over their parts. It makes no sense to acknowledge that interbrand competition affects one aftermarket, but not another.

Although it tried three different ways, the majority also failed to distinguish *General Business Systems*. First, it noted that the plaintiff there "had 'not presented facts from which [market power] could be inferred.' " App. 11A. But that is no distinction, because it is undisputed that Kodak does not have interbrand market power. Second, the majority alluded to evidence that "many Kodak parts . . . are unique." *Id.* But Philips' mlcs were unique: they were manufactured using Philips' "trade secrets and confidential specifications" and bore a legend proscribing their reproduction. *See MLC, Inc., v. North American Philips Corp.*, 1983-1 Trade Cases (CCH) ¶65,351, pp. 70,090, 70,098 n.22 (S.D.N.Y. 1983). Moreover, respondents had no evidence as to which, if any, Kodak parts were unique, no explanation as to whether the unlawfulness of the alleged tie is limited to unique parts, and no rationale for penalizing the special innovation represented by unique parts. Third, the majority improperly relied on the irrelevant fact that Kodak's share of the interbrand markets "may approach as much as twenty-three percent." App. 12A. As Judge Wallace noted, Kodak's market share is irrelevant since it has no interbrand market power. App. 24A. That distinction also runs afoul of *Jefferson Parish*, where this Court determined that a 30% market share, even combined with actual market imperfections, did not suffice to create market power.

C. The Decision Below Conflicts with this Court's Decision in *Matsushita*.

The decision below fundamentally undercuts the role of summary judgment in antitrust law. The majority ignored the underlying purposes of the antitrust laws and sidestepped this Court's ruling in *Matsushita*. There this Court held that, considering the record as a whole,

"if the factual context renders [plaintiffs'] claim implausible – if the claim is one that simply makes no economic sense – [plaintiffs] must come forward with more persuasive evidence than would otherwise be necessary." 475 U.S. at 587. Specifically, *Matsushita* rejected an expert's opinion that the alleged conspirators had depressed prices and sold goods at substantial losses. *Id.* at 594 n. 19, 600-03. The Court found that the expert's evidence of below-cost pricing had "little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational." *Id.* at 594 n. 19. In short, evidence that might otherwise permit a plaintiff to survive summary judgment will not save a plaintiff whose claims make no economic sense.

The majority ignored the *Matsushita* rule. It acknowledged that undisputed interbrand competition "might prevent Kodak from possessing power in the parts market," since equipment purchasers might not tolerate supercompetitive service pricing. App. 8A. This economic reality is unassailable. Respondents said nothing to contradict it. Nonetheless, the majority rejected it based on its speculation that market imperfections *might* exist to prevent theory from matching reality. Yet it never discussed any such imperfections and specifically excused respondents' failure to conduct a market analysis or identify specific imperfections. App. 10A.

In lieu of any market analysis, the majority substituted evidence of price differentials and price competition between Kodak and ISOs in the alleged service aftermarket.[7] That evidence does not refute in any way the overriding effect of interbrand competition. As Judge Wallace noted, the cited evidence is entirely consistent

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[7] The majority also relied on evidence of a "lock-in" as to prior purchasers. See pp. 16-17 above.

with the concept that Kodak can charge supercompetitive prices only in the suicidal short run and at risk of quickly losing its position in the far more important interbrand equipment market. App. 23A. In fact, all that evidence shows is that freeriding ISOs who do not bear the costs of establishing supply sources and maintaining parts inventories may be able to outbid those, like Kodak, who do make those investments. In no event can that evidence overcome the economic implausibility that lies at the heart of respondents' case.[8]

Thus, the majority's opinion elevates unsupported speculation over economic reality. Its reasoning is contrary to this Court's ruling that, to avoid summary

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[8] The majority suggests that respondents were not provided a sufficient opportunity to discover market power evidence. App. 10A. But complete document discovery and numerous depositions and interrogatories were allowed on that subject. Moreover, Judge Schwarzer granted respondents' initial request for additional discovery. Later, when ordered by Judge Schwarzer to identify any additional needs, respondents failed to identify the nature or subject matter of any further discovery. App. 37B-38B. Respondents' only specific discovery complaint was that two customers refused to sign declarations, one relating to their "lock-in" theory and the other to price competition on a public agency bid for a service contract. Including those declarations, the respondents' evidence was limited to (1) facts about Kodak's intent, (2) statements from respondents and one owner of Kodak equipment who believed there is a "lock-in" once equipment is bought and (3) statements that Kodak believed its superior service could command a premium and that at least once Kodak offered to lower prices in response to ISO competition. App. 10A-11A. None of this evidence is relevant to any unspecified market imperfections or to the conceded fact that interbrand competition controls the pricing of parts and service. Respondents were not denied an opportunity to develop a market analysis or pinpoint market imperfections.

judgment, a plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. It eviscerates the requirement that a plaintiff come forward with "more persuasive evidence" when, as here, a claim makes no economic sense. Indeed, the majority held that respondents need come forward with no market analysis evidence at all, even when their claims are contrary to sound, indeed admitted, economic logic.

The ruling below plainly conflicts with other cases that have applied *Matsushita*. Other appellate courts have not hesitated to require plaintiffs making implausible claims to come forward with "more persuasive evidence" to avoid summary judgment. For example, in *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), Justice, then-Judge, Kennedy wrote that:

> Where a party asserts there is a genuine issue for trial . . . its argument is measured by the underlying theory of the claim or defense being considered. . . . [T]he substantive law is the law of antitrust, and if the claim makes no economic sense, a speculative inference from the jury will not help it. In such an instance, the record on summary judgment must contain further persuasive evidence if it is to support the claim.

Accord Eichman v. Fotomat Corp., 880 F.2d 149, 161 (9th Cir. 1989). *See also Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1338-40 (7th Cir. 1989) (Easterbrook, J.); *Argus, Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 45 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

Matsushita means what it says. Summary judgment should be granted in cases where plaintiffs assert claims that make no antitrust or economic sense and that are not supported by persuasive evidence.

III. The Court of Appeals' Decision on Respondents' Monopolization Claim Conflicts with Other Court of Appeals' Decisions and Improperly Extends the Essential Facilities Doctrine.

The majority began its analysis of respondents' Section 2 claim by acknowledging the "general rule" that even a monopolist has "no duty to deal with its competitors." App. 16A. It held, however, that Kodak might fall within an exception to that rule, because (a) "[a] monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason," and (b) "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications."[9] App. 16A-17A. This holding is wrong for at least three independent reasons: (1) Kodak is not a monopolist in any relevant market; (2) Kodak presented unrefuted evidence of legitimate business justifications for its practices; and (3) replacement parts cannot be an essential facility. We address these points in turn.

1. The majority's assumption that Kodak has monopoly power is baseless. The majority conceded that monopoly power under section 2 "is something more than the market power that is a prerequisite to liability under section 1."[10] App. 19A. But as shown above, Kodak

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[9] As the majority conceded, respondents did not raise any of these arguments in the district court. App. 16A n.7. But the majority nonetheless proceeded to decide them based on its reasoning that the district court might somehow have considered these issues anyway. *Id.* That decision was improper. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

[10] The majority conceded that it had "more trouble" with the question of monopoly power, which "is not as easily

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does not even possess market power in any relevant market. By definition, it cannot possess monopoly power.

The majority attempted to avoid this problem by choosing an unreasonably narrow relevant market, limited to the service of Kodak-brand equipment. *Id.* That market definition is wrong.[11] Numerous other Circuit court decisions have rejected similar proposed submarkets limited to the service or components of a single-brand product. *See, e.g., General Business Systems*, 699 F.2d at 975; *Mozart*, 833 F.2d at 1346-47; *Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622, 623-24 (1st Cir. 1984); *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 571 (6th Cir. 1981); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 919 (10th Cir.), *cert. dism'd*, 423 U.S. 802 (1975).[12]

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answered" as the question of market power. App. 18A-19A. But without any further evidence, much less further analysis, the majority simply assumed its own answer and concluded that a triable issue exists as to monopoly power. App. 19A.

[11] It is also unsupported. The majority relied solely on *Dimidowich* to reach its conclusion that a single-brand aftermarket can be a section 2 relevant market. App. 18A. The majority misread *Dimidowich*. The Ninth Circuit there separated service from the product itself merely to determine whether two businesses were competitors, which would make their concerted refusal to deal with plaintiffs a horizontal restraint. 803 F.2d at 1480 n.3. The court did not undertake a market analysis in *Dimidowich*.

[12] *See also* Bork, *The Antitrust Paradox* 370-71 (1978) ("Any product or service can be broken down into smaller components, and the seller who refuses to do so is insisting upon tying the components together. . . . The reason for not calling these arrangements tie-ins is that requiring the seller to deal in smaller quantities (and there is no limit to the smallness of the

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The flaw in the majority's reasoning is clear – its narrowly defined market completely ignores the impact of interbrand competition.

2. As Judge Wallace noted in dissent, "Kodak's policies cannot give rise to section 2 liability if they have a legitimate business justification." App. 25A. That is true even if Kodak somehow had monopoly power in a relevant market. *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 368 (9th Cir.). *cert. denied*, 488 U.S. 870 (1988) (a monopolist's duties under section 2 "arise only when there is no justification for refusing to aid a competitor.") Kodak's evidence of its legitimate business justification – "a marketing strategy based on high-quality service" – was undisputed. App. 25A.[13] Thus, independent of the monopoly power analysis, summary judgment on the section 2 claim was required.

Previous decisions of the Ninth Circuit have held that a quality control justification is sufficient to preclude Section 2 liability. *See, e.g., Mozart*, 833 F.2d at 1350-51, 1352; *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.). *cert. denied*, 475 U.S. 1087 (1986). Nonetheless, the majority found that Kodak's business justifications might be "pretextual" and not "genuine," because

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quantity one could demand) would introduce obvious diseconomies. It would be inefficient and, therefore, anticonsumer").

[13] That business justification and two others are discussed at pp. 4-6, above. As the majority recognized, respondents had the burden of showing a lack of justification on a Section 2 claim. App. 17A n.9. Specifically, in responding to the motion for summary judgment, respondents had to come forward with "significant probative evidence" to show Kodak's lack of justification. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

"a reasonable trier of fact could find that Kodak's implementation of its policies . . . involved a specific intent to monopolize." App. 17A-18A. But as Judge Wallace noted, it does not matter whether or not Kodak may have had some monopolistic motivations, because it undisputedly had a legitimate business justification:

> "[T]he desire to maintain market power – even a monopolist's market power – cannot create antitrust liability if there was a legitimate business justification for [the challenged action]." *Oahu Gas*, 838 F.2d at 368-69.

App. 27A. Indeed, prior decisions of the First, Fifth and Seventh Circuits have held that a legitimate business justification defeats Section 2 liability, even if there is evidence of anticompetitive intent. *See Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1109-13 (lst Cir. 1989), *cert. denied*, 110 S. Ct. 473 (1990); *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 376 (7th Cir. 1986). The majority's focus on whether subjectively Kodak was motivated by anticompetitive intent and whether Kodak's business justification was "genuine" misses the point. Most lawful, procompetitive business practices are by definition designed to take business from competitors. To make motivation the test of liability would inevitably chill those lawful practices. Thus, it has "become an antitrust commonplace . . . that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Olympia*, 797 F.2d at 379. *See also* III P. Areeda & D. Turner, *Antitrust Law* ¶626 at 76 (1978).

3. The decision below establishes that a single manufacturer's brand-name replacement parts may constitute an "essential facility" that it must share with its

competitors. That result is an unprecedented and unsupported extension of the essential facility doctrine.

The majority's essential facility conclusion relies, without analysis, on this Court's decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973). App. 17A. The majority's lack of elaboration is understandable and revealing. *Otter Tail* does not and cannot support the majority's expansive reading of it. As Professor Areeda has noted, *Otter Tail* makes sense only in light of its peculiar facts:

> Far from establishing any general duty to deal, however, *Otter Tail* is very limited. Not only was the defendant a natural monopolist, it was regulated and its activities may have evaded that regulation, to the prejudice of consumers.

Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 *Antitrust L.J.* 841, 848 (1990). By contrast, Kodak is not a monopolist, other than in the sense that any manufacturer is a legal monopolist as to its own brand name. Further, Kodak is not a participant in a regulated industry; it faces fierce competition in unregulated interbrand markets. In short, *Otter Tail* has nothing to do with this case. The majority's extension of *Otter Tail* presents an opportunity for this Court to limit any expansion of the essential facilities doctrine.

The majority's reliance on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) is similarly misplaced. App. 16A. In *Aspen*, this Court expressly declined to consider the merits of the plaintiff's essential facilities claim. 472 U.S. at 611 n.44. In any event, *Aspen* must be limited to its unique facts. There, the defendant was a conceded monopolist, 472 U.S. at 596, and the Court found that the defendant had "fail[ed] to offer any efficiency justification whatever" for its unwillingness to continue its prior cooperation with the plaintiff. 472 U.S. at 608. Indeed, because the cooperation agreement had

originated in a competitive market and persisted for sixteen years, this Court found that cooperation may have been the "optimal" pattern of distribution. 472 U.S. at 604-07 and n.31. By contrast, Kodak is not a monopolist, its quality control business justification was undisputed, and its parts distribution practices are not ingrained by long-standing market forces.

The "essential facilities" doctrine should not be extended to encompass a single manufacturer's brand-name parts. The majority's expansion of the essential facilities doctrine conflicts with the decisions of other appellate courts, which have narrowly construed it. The Seventh Circuit, in *Olympia*, 797 F.2d at 376, held that a monopolist could lawfully extend help to new entrants and later withdraw that support. Similarly, in *Oahu Gas*, the Ninth Circuit held that even monopolists have a duty to assist competitors *only* when there is no business justification for the refusal. 838 F.2d at 368. *See also Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990).

The majority's decision on respondents' Section 2 claim reaches far beyond *Otter Tail* and *Aspen*. Its misapplication of the essential facilities doctrine presents a clear opportunity for the Court to define the limits of that doctrine.

IV. The Court of Appeals' Decision Hinders Innovation and Frustrates Competition

At bottom, Kodak's practices do not violate the antitrust laws because they cannot harm competition. To the contrary, Kodak's practices are dictated by and promote interbrand competition. Kodak's innovative equipment developments, which are the sole basis for respondents' existence, have given consumers greater and better choices in micrographics equipment and high volume

copiers. Kodak's ability and desire to develop new equipment is enhanced by its freedom to select parts and service strategies that it believes will support those offerings. The law requires nothing more – a company that innovates and creates a new product is not compelled to surrender the fruits of that innovation, whether it is a new copier or a new camera. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Every manufacturer of sophisticated business equipment faces the same situation as Kodak. As it decides whether or not to devote resources to innovative equipment, the manufacturer must consider its freedom to develop marketing plans, including high quality service strategies designed to improve equipment dependability. Under the majority's ruling, that innovation will be discouraged. Under Judge Schwarzer's summary judgment and Judge Wallace's dissent, innovation and competition are allowed to work.

CONCLUSION

Kodak's petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 20, 1990

APPENDIX

IMAGE TECHNICAL SERVICE, INC., a California corporation; J-E-S-P Company, Inc., a New Jersey corporation; Shields Business Machines, Inc., a Pennsylvania corporation; Micrographic Services, Inc., a Missouri corporation; Micro Maintenance, Inc., an Illinois corporation; Atlanta General Microfilm Co., Inc., a Georgia corporation; Roger Katona, doing business as G. & S. Electronics; Amtech Equipment Maintenance, Inc., a Minnesota corporation; Advanced Systems Services, Inc., a Colorado corporation; B.C.S. Technical Services, Inc., a Colorado corporation; Bob Ingle, Inc., a Missouri corporation; Data Prox Equipment Co., a New Jersey corporation; Fisher Micrographics, Inc., a Missouri corporation; I.O.A. Data Corp., a New York corporation; Searle Enterprises, doing business as Micro Image, Inc.; Midwest Microfilm Equipment & Service, Inc., a Minnesota corporation; Omin [sic] Micrographic Services, Inc.; and CPO, Ltd., a California corporation, Plaintiffs-Appellants,

v.

EASTMAN KODAK CO., a New Jersey corporation, Defendant-Appellee.

No. 88-2686.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 10, 1989.

Decided May 1, 1990.

James A. Hennefer, Law Offices of James A. Hennefer, San Francisco, Cal., for plaintiffs-appellants.

Donn P. Pickett, McCutchen, Doyle, Brown & Enersen, San Francisco, Cal., for defendant-appellee.

Appeal from the United States District Court for the Northern District of California.

Before CHAMBERS, WALLACE and WIGGINS, Circuit Judges.

WIGGINS, Circuit Judge:

Appellants are independent service organizations, or ISOs, that service copier and micrographic equipment manufactured by appellee Eastman Kodak Co. They appeal summary judgment dismissing their antitrust claims against Kodak. We reverse and remand.

At the heart of this case are two of Kodak's business policies: First, Kodak will not sell replacement parts for its equipment to Kodak equipment owners unless they agree not to use ISOs. Second, Kodak will not knowingly sell replacement parts to ISOs. Kodak admits that the purpose of these policies is to prevent ISOs from competing with Kodak's own service organization for the repair of Kodak equipment.

On appeal, appellants argue that they raised triable issues concerning: (1) whether Kodak's refusal to sell parts to equipment owners unless they agree not to use ISOs constitutes a tying arrangement violative of Section 1 of the Sherman Act; and (2) whether Kodak's refusal to sell parts to ISOs is an act of monopolization violative of Section 2 of the Sherman Act.

We have jurisdiction under 28 U.S.C. § 1291 (1982). We review the district court's grant of summary judgment de novo. *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). We must determine, viewing the evidence in the light most favorable to appellants,

whether issues of material fact exist and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

Viewed in the light most favorable to appellants, the facts are as follows: Prior to 1982, Kodak serviced almost all of its micrographic and copier equipment. Kodak would sell replacement parts (at a profit) to any party who intended to use them to repair Kodak equipment. ISOs generally do not manufacture the replacement parts they use in providing equipment service. ISOs do, however, maintain regular inventories of such parts. In reliance on Kodak's practice of freely selling replacement parts, ISOs developed and began to compete significantly with Kodak in 1984 and 1985. ISOs offered service for as little as half of Kodak's price. To better compete, Kodak in some cases cut its price for service. Some customers found ISO service superior to Kodak service.

Concerned with ISO competition, Kodak reviewed its replacement parts policies in 1985 and developed its current policies of not selling replacement parts to ISOs or to customers who use ISOs. Kodak exempted micrographic equipment manufactured before 1985 from these new policies. Since 1985, Kodak has had difficulty identifying ISOs and customers who use ISOs. Kodak, therefore, unknowingly sold parts to ISOs and customers who use them since it implemented the 1985 policies. Kodak is currently attempting to enforce more effectively its policies.

I. *The Tying Claim*

Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . , or conspiracy, in restraint of

trade or commerce." 15 U.S.C. § 1 (1982). The Supreme Court has consistently interpreted this provision to prohibit only unreasonable restraints of trade. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 108 S.Ct. 1515, 1519, 99 L.Ed.2d 808 (1988). Appellants contend that they have presented genuine issues for trial as to whether Kodak's refusal to sell spare parts to equipment owners unless they agree not to use ISOs constitutes a tying arrangement *per se* unreasonable under this section.[1]

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, *or at least agrees that he will not purchase that product from any other supplier.*" *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) (emphasis added, footnote omitted). A tying arrangement is *per se* unreasonable if the defendant has sufficient economic power in the tying product market to restrain competition appreciably in the tied product market and if the arrangement affects more than an insubstantial volume of interstate commerce in the tied product.[2] *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 499, 89 S.Ct.

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[1] Appellants briefly argue that Kodak's conduct is illegal under a rule of reason analysis. We do not consider this argument because appellants failed to raise it in response to Kodak's motion for summary judgment in the district court. *See Animal Protection Institute of America v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988) (failure to raise issue below bars consideration on appeal).

[2] Kodak does not dispute that its arrangement affects a substantial volume of interstate commerce in the tied product.

1252, 1256, 22 L.Ed.2d 495 (1969); *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1345 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 179, 102 L.Ed.2d 148 (1988); *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 977 (9th Cir. 1983).

The district court held that appellants failed to show evidence of a tying arrangement, noting that Kodak does not "condition the sale of one product on the buyer's purchase of another product" since a "Kodak customer can buy equipment without having to buy parts; and he can buy parts if he simply owns Kodak equipment." *Image Technical Services, Inc. v. Eastman Kodak Co.*, No. C-87-1686-WWS, at 5, 1988 WL 156332 (N.D.Cal.Apr. 18, 1988) (Memorandum of Opinion and Order Granting Summary Judgment). Appellants argue that the district court misconstrued one of their theories, explicitly presented in their memorandum in opposition to Kodak's motion for summary judgment. This theory is that Kodak has tied parts to service, not equipment to parts or parts to equipment.

Kodak responds that even viewed as appellants suggest, its policy is not a tying arrangement. First, Kodak points out, it does not force owners to buy service in order to receive parts; Kodak only requires owners not to buy ISO service to receive parts. Kodak will sell parts to owners who agree to self-service their machines. Kodak, however, misconceives the nature of tying agreements. As we stated above, a tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, *or at least agrees that he will not purchase that*

product from any other supplier." Northern, 356 U.S. at 5-6, 78 S.Ct. at 518 (emphasis added; footnote omitted).

Second, Kodak argues that its policy is not a tying arrangement because parts and service form a single product market, and without two distinct markets there can be no tying arrangement. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21, 104 S.Ct. 1551, 1562, 80 L.Ed.2d 2 (1984). The critical question in determining whether two distinct product markets exist is whether it is economically efficient to offer two products separately. *Id.* at 21-22, 104 S.Ct. at 1562-63. That, in turn, depends on whether the demand for each can be separated. *Id.* Kodak contends that there is no separate demand for parts and service. Indeed, Kodak contends, they are useless without each other. Consequently they are economically inseparable.

Kodak's argument presents, at best, a disputed issue of fact. That products must be used together does not eliminate the possibility that they form distinct markets. "We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." *Id.* at 19 n. 30, 104 S.Ct. at 1562 n. 30 (citing cases). Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service. Kodak does not dispute appellants' claim that some equipment owners have (perhaps surreptitiously) bought service from ISOs and parts from Kodak. Nor does Kodak dispute appellants claim that other equipment owners would have contracted with

ISOs for service if they could have obtained parts separately. *Cf. Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480 n. 3 (9th Cir. 1986) (applying California law) (noting that for some products, such as automobiles, the parts market is distinct from the service market), *modified* 810 F.2d 1517 (9th Cir. 1987); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1339 (9th Cir. 1984), *cert. denied*, 473 U.S. 908, 105 S.Ct. 3534, 87 L.Ed.2d 657 (1985) (holding that separate markets existed for computer central processing unit and computer operating system).

Having established that a tying arrangement might exist, we next consider whether, assuming that such a tying arrangement exists, there is an issue of material fact as to whether Kodak has sufficient economic power in the tying product market to restrain competition appreciably in the tied product market. To determine such market power, courts commonly consider whether the defendant is able to force or to induce some potential tying-product customers (here potential Kodak parts customers) to purchase the tied product (here Kodak service) that these customers would not purchase absent the tying arrangement. *Jefferson Parish*, 466 U.S. at 12-18, 104 S.Ct. at 1558-61; *Mozart*, 833 F.2d at 1345; *Digidyne*, 734 F.2d at 1339-41. The district court did not decide this issue.

Appellants suggest that Kodak does have power in the parts market for two interdependent reasons. First, many Kodak parts are unique and available only from Kodak. *See Jefferson Parish*, 466 U.S. at 17, 104 S.Ct. at 1560 (explaining that a defendant may have market power if he offers a unique product that others are unable to offer). Second, owners of Kodak machinery cannot readily switch to other companies' machinery (thereby

obviating the need for Kodak parts). Once one owns Kodak's expensive machinery, appellants argue, he is locked in to it. *See Digidyne*, 734 F.2d at 1342 (discussing how market power can be enhanced by customer lock-in).

Kodak counters, first, that it does not have market power in the interbrand markets for copier or micrographic equipment.[3] Thus, Kodak argues, it cannot have market power in the after-market for spare parts. Kodak points out that appellants do not dispute that equipment purchasers consider the cost of parts and service when initially deciding between Kodak's equipment and its competitors' equipment. If Kodak were to charge supercompetitive prices for parts and service, equipment purchasers would buy competitors' equipment. Second, Kodak argues that appellants have failed to present sufficient evidence that its equipment owners cannot economically replace their current equipment.

We believe that competition in the interbrand markets might prevent Kodak from possessing power in the parts market. To be sure, this case is distinguishable from those in which the defendants had tied parts to equipment. In those cases, since equipment was the tying product, interbrand competition in the equipment market readily negated the plaintiffs' claims that the defendants

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[3] Kodak estimates its share of the micrographic market to be less than twenty percent. Kodak estimates its overall market share for plain paper copiers was less than two percent in 1984 and its current share of the high-volume segment of the copier market is approximately twenty-three percent. Appellants do not dispute Kodak's assertion that it lacks market power in the interbrand markets.

possessed power in the tying product market. *See, e.g., Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988) (tying of cars to parts). In this case, Kodak has tied parts to service, not equipment to parts. Interbrand competition in the equipment market does not in the abstract negate appellants' claim that Kodak has power in the parts market. *See Dimidowich*, 803 F.2d at 1480 n. 3 (pointing out that an owner of a broken piece of Bell and Howell micrographic equipment cannot turn to people who service only Kodak or 3M equipment).

But just as equipment purchasers would turn to one of Kodak's competitors if Kodak tied supercompetitively priced parts or service directly to equipment, equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts. Kodak's desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service. As we stated in a case involving a computer company's alleged tying of service and warranty protection to computer hardware, "To have attempted to impose significant pressure to buy [computer parts] by use of the tying service only would have hastened the date on which [defendant] surrendered to its competitors in the small business computer market." *Philips*, 699 F.2d at 977; *see also Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988) (Posner, J. dissenting) (suggesting, in the context of a tie of parts to motors, that market forces will keep a company that lacks interbrand market power from charging supercompetitive prices in the parts market), *cert. denied*, ___ U.S. ___, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989).

Nevertheless, we cannot uphold the district court's grant of summary judgment on this theoretical basis. Not only do we lack the benefit of the district court's consideration of the market power issue, we are presented with a record that was not fully developed through discovery on this issue.[4] Furthermore, market imperfections can keep economic theories about how consumers will act from mirroring reality. *See Jefferson Parish*, 466 U.S. at 15 n. 24, 104 S.Ct. at 1560 n. 24 (noting that market imperfections can keep consumers from seeing the price and quality implications of a tying arrangement). While appellants have not conducted a market analysis and pin-pointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality. It is enough that appellants have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market. For example, appellants have presented evidence that Kodak charges up to twice as much as appellants for service that is of lower quality than appellants' service. Appellants presented evidence that in some

[4] The district court permitted only very limited discovery on the market power issue. Appellants requested further discovery in their opposition to Kodak's summary judgment motion. For example, appellants requested to depose two ISO customers who allegedly would not sign accurate statements concerning Kodak's market power in the parts market. Not finding it necessary to reach the market power issue in its decision, the district court, of course, had no reason to grant this request.

instances competition from ISOs drove down the price that Kodak was willing to charge for service and that in other instances some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems. *See Fortner*, 394 U.S. at 503-04, 89 S.Ct. at 1258-59 (a price differential may suggest market power).

Appellants' evidence distinguishes this case from *Philips*. In that case, involving a district court's proper summary judgment for a defendant on a tying claim based upon a lack of market power, we explicitly found that the plaintiff had "not presented facts from which [market power] could be inferred." *Philips*, 699 F.2d at 977. For example, in contrast to the situation in this case, it appeared uncontroverted that the higher price for the tied product was due to the product's greater reliability. *See Philips*, 699 F.2d at 969, 972-73, 977-78. The tied product did not go down in price after the tying arrangement ceased. *Id.* at 977.

There also appears to have been no evidence that Philips was the exclusive source of service for Philips computers, the tying product. But appellants have presented evidence that many Kodak parts, the tying product, are unique and available only from Kodak.

Furthermore, Philips' share of the interbrand computer market never exceeded five percent. *Id.* at 969. At the time of Philips' alleged tying arrangement, Philips' share of the interbrand market was declining as Philips' computers were "threatened . . . with obsolescence." *Id.* at 970. Roughly one year into the lawsuit, Philips withdrew completely from the American computer market. *Id.* at

969-70. By contrast, Kodak's share of the interbrand copier and micrographic equipment markets varies and may approach as much as twenty-three percent. *See ante* at 616, n. 3. Far from being threatened with obsolescence, Kodak's equipment is state of the art.

Granted, appellants have not claimed that these factors are sufficient to give Kodak power in its interbrand markets. But just as market share is not alone determinative of market power, *cf. Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1204 (9th Cir. 1975) (market share is not determinative of monopoly power), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976), power in the interbrand market is not the *only* basis for power in the parts market. Some strength in the interbrand market, although short of actual market power, can combine with other factors to yield power in an after-market. We, therefore, believe that the contrast between Kodak's and Philips' strength in their interbrand markets is another indication of a difference in power in their after-markets. *Cf. Sterling*, 866 F.2d at 236 (Posner, J., dissenting) (defendant's market share was one-tenth of one percent).

Viewed in the light most favorable to appellants, the evidence that they have presented is sufficient to raise a material issue of fact as to whether Kodak has power in the parts market.

Kodak also contends that it has legitimate business reasons for refusing to sell parts to equipment owners who use ISOs. This court has held that a tying arrangement "does not violate the antitrust laws 'if implemented for a legitimate business reason and if no less restrictive

alternative is available.' " *Mozart*, 833 F.2d at 1349 (citing *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 739 (9th Cir. 1981)). Kodak contends that it implemented its parts policies for three legitimate business reasons: (1) To guard against inadequate service, which reflects negatively on Kodak because customers cannot differentiate between bad service and bad equipment; (2) to remove inventory costs, which Kodak incurs in supplying replacement parts to non-users of Kodak service; (3) to prevent ISOs from free-riding on Kodak's investment in the copier and micrographic industry.

Appellants argue that Kodak's proffered reasons are pretextual or insufficient. Once again, the district court did not discuss this aspect of the case and we cannot say as a matter of law that Kodak's proffered reasons for its policies are genuine and sufficient. To prevail on the basis of its first reason, Kodak would have to prove[5] that its tying arrangement is the only way that highest quality service can be assured. *See id.* at 1350 & n. 7. But appellants have presented evidence that their service is superior to Kodak service. Furthermore, appellants have presented evidence from which a reasonable trier of fact could conclude that Kodak's first reason is pretextual. For example, appellants have presented evidence that Kodak for the first time refused to sell parts to appellant Image Technical Services, Inc. just two months after Image, in competitive bidding against Kodak, won contracts with

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[5] The defendant bears the burden of proving legitimate business reasons under Sections 1 of the Sherman Act. *Id.* at 1349.

the state of California. Triable issues of fact surround Kodak's first reason.

A reasonable trier of fact could also conclude that Kodak's second reason is pretextual. A reasonable trier of fact need not accept Kodak's assertion that not selling parts to equipment owners who use ISOs will reduce its inventory costs. A reasonable trier of fact could conclude that equipment owners' need for Kodak-supplied parts is determined only by the frequency of equipment failure. Indeed, Kodak's policy is based on the premise that equipment owners will have to buy replacement parts from Kodak, even if it means not using ISOs. Thus, triable issues of fact surround Kodak's second reason.

As a matter of law, Kodak's third reason cannot justify its policy. Kodak believes that if ISOs are to compete with it, they should be required to overcome the barriers to entering the parts market as well as the barriers to entering the service market. But one evil of a tying arrangement is precisely that it creates an entry barrier for potential competitors by requiring them to enter two product markets simultaneously. *Fortner*, 394 U.S. at 509, 89 S.Ct. at 1261. For this reason, "recovery of investment costs has been explicitly excluded from the narrowly-construed exceptions to the *per se* rule against tie-ins." *Digidyne*, 734 F.2d at 1343-44 (quoting *In re Data General Corp. Antitrust Litigation*, 490 F.Supp. 1089, 1122 (N.D.Cal. 1980). As a matter of law, therefore, it is a less restrictive alternative for Kodak to structure its prices for equipment, parts, and service so that the price for which Kodak sells each of these reflects Kodak's investment costs in that area. *Id.* at 1344 (citing *United States v. Jerrold*

Electronics Corp., 187 F.Supp. 545 (E.D.Pa. 1960), *aff'd per curiam*, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961)).

Finally, Kodak suggests that it acted unilaterally in tying parts to service. It is true that independent action is not proscribed by Section 1 of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984). But Kodak entered into agreements with its equipment owners expressly set out in its "Terms of Sale," that it will sell parts only to users "who service only their own Kodak equipment." If such conduct were to be labelled "independent," virtually all tying arrangements would be beyond the reach of Section 1. We do not believe that *Monsanto*, without discussing the courts' tying decisions, meant to overturn them.

The district court improperly granted summary judgment on the Section 1 claim.

II. *The Refusal to Deal Claim*

Section 2 of the Sherman Act makes it illegal for any person to "monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2 (1982). For a person to be guilty of monopolization, he must (1) possess monopoly power in the relevant market; and (2) wilfully engage in conduct designed to maintain that power improperly. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966). For a person to be guilty of attempted monopolization, he must (1) possess a specific intent to monopolize the relevant market with a dangerous probability of success; and (2) wilfully engage in conduct designed to

achieve monopoly power improperly. *California Computer Prod. v. IBM*, 613 F.2d 727, 736 (9th Cir.1979).[6] Appellants contend that they have presented genuine issues for trial as to whether Kodak has, in allegedly changing a long-standing policy of supplying Kodak parts to ISOs, engaged in improper monopolization or attempted monopolization conduct.[7]

The district court found that Kodak had no duty to deal with its competitors. We agree with the district court's statement of this general rule; however, we believe that there are material issues of fact concerning whether Kodak falls within one of the exceptions to it. A monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608, 105 S.Ct. 2847, 2860, 86 L.Ed.2d 467 (1985); *Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 368 (9th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). In the same spirit, a monopolist may not retaliate against a customer who is also a competitor by denying him access to a

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[6] The cases also identify the standing requirement of "causal antitrust injury." *Id.* Kodak does not dispute appellants' standing to bring its Section 2 claim.

[7] Kodak contends that appellants did not raise this argument below. From reading only appellants' Memorandum in Opposition to Kodak's Motion for Summary Judgment, one can reach this conclusion. Certainly the focus of appellants' Section 2 claim has changed on appeal. But after reading all the papers surrounding Kodak's summary judgment motion, we are not confident enough that the district court did not consider appellants' present argument to foreclose appellants from raising that argument here.

facility essential to his operations, absent legitimate business justifications. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S.Ct. 1022, 1029, 35 L.Ed.2d 359 (1973). Appellants have presented sufficient evidence, recounted above, from which a reasonable trier of fact could find that Kodak's implementation of its policies was anticompetitive, exclusionary, and involved a specific intent to monopolize. *Cf. Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1339 (9th Cir.1983) (service contractor for distributor of money-handling machines produced no evidence that manufacturer who refused to sell contractor parts after manufacturer terminated distributor acted in a predatory manner or was not predominantly motivated by legitimate business purposes); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119-21 (9th Cir.1972) (distributor of dictating equipment produced no evidence that manufacturer who terminated him was motivated by anticompetitive intent).[8]

We have already discussed Kodak's proffered business justifications in our treatment of appellants' Section 1 claim. Although there is no least restrictive alternative requirement in the context of a Section 2 claim,[9] we noted

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[8] The dissent implies that *Mozart* compels acceptance of Kodak's proffered quality control justification on Kodak's Section 2 claim. *See* Dissent at 624. However, *Mozart* merely held that substantial evidence supported a jury's determination that the defendant's proffered quality control justification was genuine, *Mozart*, 833 F.2d at 1350-51, 1352, despite the "skepticism" which "the quality control defense . . . usually has been accorded," *id.* at 1349.

[9] The plaintiff also bears the burden of proving lack of legitimate business justifications in a Section 2 claim. *Calculators Hawaii*, 724 F.2d at 1339.

above that there exist triable issues of fact as to whether Kodak's first two proffered reasons are genuine rather than pretextual. With respect to Kodak's third reason, we observed above that it was precisely the kind of justification the theory behind Section 1 negated. The same is true under Section 2. A claim that one need not support a competitor's activities is merely a claim that one has no duty to deal with that competitor. Such a claim cannot serve as a justification for conduct which has been found to be exempted from this general rule.[10]

We have more trouble with the monopoly power (or dangerous probability of monopoly power) issue. The district court did not discuss whether the service of Kodak equipment could be a relevant market and whether Kodak might possess monopoly power or a dangerous possibility of monopoly power in that market. This court has strongly suggested that service of one company's micrographic equipment can be a relevant market under Section 2. *See Dimidowich,* 803 F.2d at 1480-81 n. 3 ("[A]n owner of broken [Bell & Howell] micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the owner's only option is to request service from Bell & Howell or Comgraphix

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[10] We stress that there exists a triable issue of fact as to whether Kodak has *any* non-pretextual legitimate business reason for its conduct. We do not suggest, as the dissent contends, "that because the quality control defense failed under section 1, it must also fail under section 2." Dissent at 624. Likewise, the dissent's argument that the law allows a defendant to overcome a section 2 claim when he has acted in part out of a desire to exclude competition and in part for a legitimate business reason is beside the point.

(depending on his location), that is obviously the market the owner faces."); *Cf. Bushie,* 460 F.2d at 118 n. 1, 120-21 (implying without analysis that the relevant market for servicing dictating equipment is the interbrand service market). We cannot say as a matter of law that service of Kodak equipment is not the relevant market in this case.

Assuming such a market, might Kodak have monopoly power in it? Monopoly power is the "power to control prices or exclude competition" in the relevant market. *United States v. E.I. DuPont DeNemours & Co.,* 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). It is something more than the market power that is a prerequisite to liability under Section 1. *See Digidyne,* 734 F.2d at 1339-41. The question whether appellants have presented sufficient evidence on this issue is thus not as easily answered as the question whether they have presented sufficient evidence on market power. We conclude that the evidence presented by appellants is sufficient to withstand summary judgment. Again, there is logical appeal in Kodak's theory that it could not have monopoly power (let alone market power) in the service market since it lacks economic power in the interbrand markets. But in light of appellants' evidence we cannot say that this theory mirrors reality.

The district court improperly granted summary judgment on the Section 2 claim.

The judgment of the district court is REVERSED and the case is REMANDED.

WALLACE, Circuit Judge, dissenting:

I cannot agree with the conclusions reached by the majority. I would affirm the judgment of the district court on both the tying and the attempted monopolization claims. On the first claim, Image Technical Services (Image Tech) has failed to raise any genuine issues of material fact with regard to Kodak's market power in the market for replacement parts. On the second claim, the record shows that Kodak has a legitimate business reason for its allegedly monopolistic behavior. Therefore, summary judgment was proper on both claims.

I

I agree with the majority that Image Tech has raised triable issues as to whether Kodak's business practices constitute a tying arrangement. However, not all ties are proscribed by the antitrust laws. Rather, to establish a violation of section 1 of the Sherman Act, Image Tech must show that Kodak possesses sufficient power in the market for the tying product (parts) to appreciably restrain competition in the market for the tied product (service).

Image Tech does not contest that Kodak lacks market power in the interbrand market for copiers. Further, it is uncontested that purchasers of copiers consider costs of maintenance and repair in deciding which brand to buy. Therefore, I do not see how Kodak could have any market power in the market for replacement parts. If Kodak attempts to increase the price of replacement parts above the competitive level, new buyers will increase their estimates of the total price (including parts and service) of a

Kodak copier. If some current Kodak owners are unwilling to scrap their copiers and buy new ones from other manufacturers, Kodak will gain short-run profits from the sale of parts. However, as new buyers switch brands, Kodak will lose market share in the sales of new copiers, to its long-term disadvantage.

I find persuasive Judge Posner's reasoning in the closely analogous case of *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228 (7th Cir.1988) (Posner, J., dissenting) (*Sterling*). In that case, Sterling tied replacement parts to purchases of new Sterling motors. The majority did not reach the question of the legality of the tie. Judge Posner did so, and concluded that Sterling's lack of power in the interbrand market for motors precluded a finding of market power in the derivative market for replacement parts:

> [Plaintiff] argues that Sterling has a monopoly of replacement parts *for Sterling motors*. This is true in the trivial sense that only Sterling manufactures parts usable in those motors. But it would be absurd to infer from this . . . that Sterling has market power, that is, power to raise the price of its parts above the price that a competitive market would charge, without losing so many sales as to make the price increase unprofitable. . . . Sterling could in principle exploit its "monopoly" by setting its price for replacement parts just below the point at which owners of Sterling motors would decide to scrap the motors rather than pay an exorbitant price for the parts necessary to keep them in service. But this would be a short-run game, since as soon as word got out no one would buy Sterling motors.

Id. at 236 (Posner, J., dissenting).

We accepted a similar argument in *General Business Systems v. North American Philips Co.*, 699 F.2d 965 (9th Cir.1983) (*General Business Systems*). There, Philips, a computer manufacturer, was accused of illegally tying service and warranty protection (the tying service) to parts (the tied product). Philips lacked market power in the primary interbrand small business computer market. We held that as a result, Philips could not have had any market power in the derivative markets for service and warranty protection. In affirming summary judgment for Philips, we stated: "To have attempted to impose significant pressure to buy [the tied product] by use of the tying service only would have hastened the date on which Philips surrendered to its competitors in the small business computer market." *Id.* at 977.

The majority acknowledges the force of this reasoning, but finds that it is too "theoretical" to serve as a basis for summary judgment. Maj. op. at 616-17. The majority's principal argument is that Image Tech has presented evidence suggesting that Kodak is exercising market power in the parts market. Moreover, the majority observes that the district court allowed only incomplete discovery on this issue, so that summary judgment would be inappropriate given the underdeveloped record.[1]

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[1] The majority also suggests that the theory outlined in *Sterling* and *General Business Systems* may not reflect the reality in this case because of "market imperfections." No evidence of market imperfections has been presented, and the majority does not identify any specific imperfections which might invalidate the theory.

I think the majority has misconstrued the nature of Kodak's argument. Applying Judge Posner's analysis in *Sterling*, competition in the interbrand market dictates a simple choice: Kodak may either price parts competitively and maintain its interbrand market share, or it may price parts supercompetitively – yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. The result would be "a brief perturbation in competitive conditions – not the sort of thing the antitrust laws do or should worry about." *Sterling*, 866 F.2d at 236 (Posner, J., dissenting).

That Image Tech presents some evidence suggesting that Kodak is not pricing parts competitively, or that Image Tech might be able to do so given additional discovery, should not be sufficient to defeat summary judgment. At best, this would be evidence that Kodak is pursuing a self-destructive pricing strategy which lacks long-term effects upon competition. It is not evidence of true market power. Rather, because lack of power in the interbrand market *necessarily* precludes power in the derivative market, Image Tech must raise allegations that Kodak has interbrand market power. No amount of evidence of pricing in the derivative market can overcome this requirement.

The majority attempts to distinguish *General Business Systems* on its facts. The majority correctly points out that in *General Business Systems*, there was some factual evidence supporting a finding that Philips lacked market

power in the derivative market: the higher price for the tied product was attributable to the product's greater reliability, and Philips was not the exclusive source of the tying product. *General Business Systems*, 699 F.2d at 977-78. However, we did not indicate that such evidence was necessary to the holding. Rather, we were persuaded by the theoretical argument – which the majority declines to accept – that any attempt to exercise power in the tying market would prove fatal in the long run; we then pointed out the factual evidence as additional support for our conclusion. *See id.* at 977.

I am puzzled by the majority's argument that *General Business Systems* is also distinguishable because Kodak has a 25 percent share of the interbrand market, whereas Philip's share was small and declining. Maj. op. at 616. The majority does not suggest why this provides a meaningful distinction. Image Tech concedes that Kodak lacks interbrand market power. Therefore, the majority's holding is tenable only if power in the interbrand market is not relevant to power in the derivative market. I cannot see how the magnitude of Kodak's interbrand market share – once it is conceded that it does not amount to market power – is relevant to any theory of this case. Although the majority states that Kodak's market share, when combined with (unspecified) "other factors," could produce power in the derivative market, maj. op. at 618, no analysis is provided to support this contention.

General Business Systems cannot be so readily distinguished. Nor can the economic logic of Kodak's position be overcome. The majority purports to reject reliance upon theoretical bases in considering the tying claim. However, a theoretical question is necessarily presented:

is it possible to have power in the derivative market for replacement parts without possessing power in the primary interbrand market for copiers? The majority answers in the affirmative. However, it does so without analysis or explanation, and without argument from economic principles or legal precedents. In essence, the majority simply ignores the reasoning of *General Business Systems* and Judge Posner's opinion in *Sterling*. No one – neither Image Tech nor the majority – offers a reason why these analyses should be disregarded.

Because I am convinced that power in the primary interbrand market is a prerequisite to power in the derivative market for replacement parts, I conclude that market power has not been demonstrated and would affirm the summary judgment on the section 1 claim.

II

I also believe that summary judgment was appropriate on the attempt-to-monopolize claim under section 2 of the Sherman Act. Kodak's policies cannot give rise to section 2 liability if they have a legitimate business justification. *Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 368 (9th Cir.) (*Oahu Gas*), *cert. denied*, ___ U.S. ___, 109 S.Ct., 180, 102 L.Ed.2d 149 (1988); *see Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 608, 105 S.Ct. 2847, 2860, 86 L.Ed.2d 467 (1985). The burden of proof is on the plaintiff to show that there is no such legitimate justification. *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1339 (9th Cir.1983).

Kodak submitted extensive and undisputed evidence of a marketing strategy based on high-quality service.

Kodak alleges that independent service organizations (ISOs) such as Image Tech may provide low-quality service, which will reflect negatively on Kodak and undermine its quality-of-service strategy. According to Kodak, the tying of replacement parts to service is used to police against poor-quality service by the ISOs. To defeat a motion for summary judgment, Image Tech, as the party with the burden of proof, was required to present evidence to refute these allegations. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). It failed to do so.

In *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1350-51, 1352 (9th Cir.1987) (*Mozart*), *cert. denied*, ___ U.S. ___, 109 S.Ct. 179, 102 L.Ed.2d 148 (1988), we held that an almost identical argument was sufficient to defeat liability under section 2. There, Mercedes based its reputation in part on the quality of its replacement parts. Mercedes refused to supply dealers with new cars unless the dealer purchased parts from Mercedes, *Id.* at 1344, 1351. Mercedes argued that this policy was used to maintain the high quality of replacement parts. We held that this tying arrangement was permissible due to the legitimate business justification of quality control. *Id.* at 1351, 1352; *see also Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.) ("desire to control quality" held a legitimate business justification for a tying arrangement sufficient to support summary judgment on a section 2 claim), *cert. denied*, 475 U.S. 1087, 106 S.Ct. 1471, 89 L.Ed.2d 727 (1986).

Image Tech argues, and the majority agrees, that summary judgment is not appropriate because Kodak's policies may in part be motivated by a desire to exclude

the ISOs. However, the mere presence of monopolistic motivations is insufficient to establish liability. "Where a monopolist's [activity] is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. . . . [T]he desire to maintain market power – even a monopolists' market power – cannot create antitrust liability if there was a legitimate business justification for [the challenged action]." *Oahu Gas*, 838 F.2d at 368-69.

Image Tech also argues that Kodak's proposed justification is insufficient because strategies are available to accomplish the same objectives that pose a lesser injury to competition. A defendant's proposed business rationale cannot serve as a defense to a *section 1* tying claim unless the challenged practice is the least restrictive alternative for achieving the stated goal. *Mozart*, 833 F.2d at 1349. Thus, the majority rightly rejects Kodak's use of the quality-control defense in the context of the section 1 claim. Maj. op. at 618. However, no such requirement exists under section 2. *Any* business justification – whether or not it is the least restrictive – will defeat an attempt-to-monopolize claim. *Oahu Gas*, 838 F.2d at 368-69 (A monopolist's duties under section 2 "arise only when there is *no* justification for refusing to aid a competitor." (emphasis added)); *see also Mozart*, 833 F.2d at 1352. Thus, the majority's suggestion – that because the quality-control defense failed under section 1, it must also fail under section 2 – misconstrues the section 2 test. There is no less-restrictive alternative requirement here.

Image Tech has raised no genuine issue of material fact showing Kodak's policy to be unsupported by legitimate business judgment. While the policy may not be the least restrictive alternative, and while it may also involve in part a desire to enhance Kodak's market share in service, such circumstances are insufficient to establish liability under section 2. I would affirm the summary judgment on this claim as well.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al.,	)	NO. C-87-1686-WWS
Plaintiffs,	)	MEMORANDUM OF OPINION AND ORDER
v.	)	
EASTMAN KODAK COMPANY,	)	(Filed
Defendant.	)	Apr 18, 1988)

The eighteen plaintiffs in this action are independent service organizations ("ISO's") engaged in repairing and servicing defendant Eastman Kodak Company's copiers and micrographic equipment, and in buying, reconditioning and selling used Kodak copiers and micrographic equipment. They alleged that Kodak has violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14, as well as state laws, by restricting the sale of replacement parts to direct Kodak equipment customers and by refusing to sell service contracts on used equipment unless it is first inspected and brought up to standard by Kodak.

Kodak has moved for summary judgment on the ground that the policies and practices complained of, as to which there is no material dispute, do not as a matter of law violate federal antitrust laws.[1]

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[1] The parties have filed 120 pages of briefs and voluminous supplementary material. Regrettably this occurred because the opening brief was filed during the absence of the

(Continued on following page)

The Materials Facts

Kodak manufactures and markets a line of copier-duplicators under the trade name "Ektaprint." It also manufactures and markets business imaging equipment, such as microfilmers and reader-printers. Kodak provides after-sale service for these products.

With respect to copier-duplicators, Kodak has since 1975 not knowingly sold parts to anyone other than direct purchasers of that equipment. Plaintiffs contend that there may have been exceptions to this policy and that it was not put in writing until 1985. However, there is no material dispute concerning the existence of the practice.

Since 1985, Kodak has also sold imaging equipment parts only to purchasers of such equipment, with certain qualifications not material here.

The effect of these practices is to generally bar sales of parts required to repair and maintain Kodak copiers and imaging equipment to plaintiffs and other ISO's.

Kodak also sells equipment maintenance agreements on copiers and imaging machines. It only sells such agreements on used equipment if it first inspects the

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(Continued from previous page)

assigned judge who would not have permitted it. Because the briefs escaped the discipline imposed by the Court's 25 page limitation, they are verbose, disorganized, repetitive, overly argumentative and replete with immaterial matter, unnecessarily increasing the Court's burden. Counsel could have presented their case far more effectively if they had taken the trouble to write concise briefs directed to the issues.

equipment and brings it up to basic performance standards at the customer's expense. Thus purchasers of used equipment from ISO's who want to purchase a maintenance agreement from Kodak must first submit the equipment to Kodak for inspection and any necessary upgrading.

Discussion

The Section 1 Claim

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade." "Essential to every § 1 offense is concert of action between separate business entities. It is axiomatic that unilateral activity by a single firm cannot be reached with this section." *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 286 (5th Cir. 1978).

Plaintiffs' complaint alleges that Kodak has entered into conspiracies with original equipment manufacturers to prevent them from providing parts for Kodak equipment to plaintiff, with owners of Kodak equipment to prevent them from selling parts to plaintiffs, with organizations that repair Kodak equipment to refuse to deal with plaintiffs, and with entities providing financing for the purchase of Kodak equipment to cause them to require Kodak repair and service as a condition of financing.

In their opposition to the motion, however, plaintiffs make no effort to support any of these allegations. They have produced two declarations in which the declarants state Kodak suppliers refused to sell them Kodak parts

because of "arrangements with Kodak" or because the parts were "proprietary" to Kodak. But these statements are hearsay and do not satisfy plaintiffs' burden under Rule 56(e) to come forward with admissible evidence showing the existence of a genuine issue. *See Celotex v. Catrett*, 477 U.S. 317 (1986).[2] Moreover, any arrangement between Kodak and its parts suppliers under which the suppliers sell Kodak parts exclusively to Kodak without more would not sustain an inference of a Section 1 conspiracy. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-95 (1986). Plaintiffs' discussion of the conspiracy cases is therefore wholly academic. Pltfs. Opp. at 48-50.[3]

Aside from having come forward with no evidence to support a finding of an unlawful agreement, plaintiffs have not demonstrated the existence of a tying arrangement. A tying arrangement is "an agreement by a party to sell one produce but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he will not purchase that product from any other supplier." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958) (footnote omitted).

There is no evidence of any such arrangement in this case. In selling its copiers and imaging equipment, Kodak does not require the buyer to agree to purchase parts or service from Kodak. Nor does it condition the sale of one

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[2] Plaintiffs make no claim that further discovery would enable them to produce facts showing a conspiracy. *See infra*, pp. 8-10.

[3] In the absence of an agreement, the claim under Section 3 of the Clayton Act must fail.

product on the buyer's purchase of another product. *See Dimidowich v. Bell & Howell*, 590 F. Supp. 45, 49 (E.D. Cal. (1984), *aff'd in relevant part*, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987). A Kodak customer can buy equipment without having to buy parts; and he can buy part if he simply owns Kodak equipment. He can buy a Kodak maintenance agreement so long as his equipment qualifies, *i.e.*, so long as Kodak has found that it is in satisfactory condition or, if not, has brought it up to satisfactory condition. *Compare Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1343, 1344 (9th Cir. 1987) (Mercedes franchisee required to deal exclusively in Mercedes parts).

The fact that Kodak refused to sell parts to plaintiffs and other ISO's does not violate Section 1. The right of a manufacturer unilaterally to select its customers and to refuse to sell to others is well-established, regardless of the possible adverse effect on would-be customers. *Bushie v. Stenocord Corporation*, 460 F.2d 116, 119 (9th Cir. 1972); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (1983); *see Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 n.27 (1985). *Compare Dimidowich*, 803 F.2d at 1479 (where there was evidence of a concerted refusal to deal).

This case must be distinguished from *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), on which plaintiffs rely. That case held invalid under Section 1 a tying arrangement under which Data General refused to license its copyrighted RDOS operating system for use with certain computer processing units unless the licenses also purchased those processing units from Data

General. Competing manufacturers of emulating processing units complained of having been excluded from the market. The court held that the desirability of Data General's RDOS, including the fact that it was copyrighted, gave Data General sufficient power in the relevant market to force buyers to buy processing units from Data General rather than from competing manufacturers.

Contrary to plaintiffs' argument, *Digidyne* did not establish a "lock in" theory. The Court held that the tying power of the RDOS system was only enhanced by the fact that customers were "locked in" to the use of RDOS. Purchasers of the RDOS operating system, who were primarily original equipment manufacturers, were "locked in" because they had to develop and install application software compatible with RDOS for their processing units. Once developed at substantial expense, it became uneconomical for manufacturers to abandon the application software for future production in order to change to another operating system.

All that *Digidyne* illustrates is the existence of a continuing tying arrangement, the effectiveness of which was enhanced because the initial investment in compatible application software gave customers an economic incentive to continue buying Data General's processing units. The case has nothing to do with the present situation in which customers who have purchased Kodak equipment in a competitive market will tend to retain that equipment for its economic life.

The Section 2 Claim

Plaintiffs contend that Kodak violated § 2 by leveraging monopoly power in one market to gain competitive

advantage in another. *Berkey Photo Co. v. Eastman Kodak Co.*, 603 F.2d 263, 275-76 (2d Cir. 1979); *but see Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1346-47 (9th Cir. 1986) (leveraging theory not adopted in Ninth Circuit). The argument, even if legally valid in this circuit, lacks any factual support.

Plaintiffs do not contend Kodak possesses monopoly power in the new equipment market in which it competes with Xerox, IBM, Bell and Howell, 3M, and various Japanese manufacturers and holds no significant share.

Plaintiffs contend that Kodak has a dominant share of a purported market for servicing Kodak copiers and micrographic equipment. Assuming without deciding that such a market can be found to exist and that Kodak has market power in it, plaintiffs have not come forward with any facts to suggest that Kodak has attempted to leverage power in that market to gain competitive advantage in another market. *See* Pltfs. Opp. at 50-52.

Kodak has, of course, a natural monopoly over the market for parts it sells under its name but that imposes no duty on it to sell to plaintiffs. *See Olympia Equip. Leasing v. Western Union Telegraph*, 797 F.2d 370, 375 (7th Cir. 1986) ("a firm with lawful monopoly power has no general duty to help its competitors.") *Compare Aspen Skiing Co. v. Aspen Highlands Skiing Corp., supra* (dominant seller monopolized market by terminating joint arrangement with competitor). Kodak's unilateral refusal to sell its parts to plaintiffs does not violate Section 2. *Bushie*, 460 F.2d at 120.

Discovery

Kodak's motion for summary judgment was filed on August 19, 1987. On September 11, 1987, a status conference was held following which the Court issued an order that (1) deferred briefing and hearing on the motion for summary judgment until after completion of plaintiffs' discovery, and (2) made the following provisions for discovery:

> 2. On or before September 25, 1987 plaintiff shall file and serve on defendant one set of interrogatories . . . [and]
>
> 3. . . . one set of requests for production of documents pertaining to the issues raised by and material to defendant's summary judgment motion.
>
> 4. On or before September 25, 1987, plaintiff shall file and serve on defendant notices of no more than four depositions of persons with knowledge pertaining to the issues raised by and material to defendant's summary judgment motion.
>
> 5. Except by leave of Court, plaintiff shall not at this time take any discovery other than that outlined in Paragraphs 2, 3 and 4 above. Upon completion of this discovery, plaintiff may, if it so desires, seek leave of Court to take additional discovery pertaining to defendant's pending summary judgment motion.

In response to plaintiff's request, on January 4, 1988, the Court entered a further order stating:

> 2. Without altering the above-described briefing schedule, plaintiffs shall be given the opportunity to take the depositions of no more than two additional deponents who can provide

> testimony regarding the issue of market power raised in defendant's motion for summary judgment.
>
> 3. Without altering the above-described briefing schedule, defendant will, upon specific requests by plaintiffs, provide plaintiffs with the source, author and/or date, if ascertainable, of any documents already produced to plaintiffs by defendant.
>
> 4. In connection with their response to defendant's motion for summary judgment, plaintiffs may move this Court, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, for the opportunity to obtain further discovery relevant to the issues raised by and material to defendant's summary judgment motion. Any request for additional discovery should be accompanied by an explanation of the relevance of the requested information to the issues raised by and material to defendant's motion for summary judgment.

No further requests for discovery were made by plaintiffs until the filing of their opposition memorandum to this motion. For the first time, they invoke Rule 56(f), but without specifying the nature or subject matter of the additional discovery sought. Pltfs. Opp. at 52-54. In this accompanying declaration, plaintiffs' counsel states that discovery has been limited but only as to "the important issues in the marketplace with regard to: 1) relevant market; 2) market power; and competitive injury." Decl. of Hennefer at 4, para. 18. Counsel does not disclose what additional discovery may be needed or how it may help plaintiffs cure the fatal deficiencies in their case.

The material issue in this motion is the lawfulness of Kodak's business policies and practices. Plaintiffs' counsel does not claim that these policies and practices are not well known to plaintiffs or that there are material factual disputes concerning them. Nor is it explained how additional discovery could affect the determination of lawfulness.

Nor does plaintiffs' counsel stated that additional discovery is necessary or desired on the issue of conspiracy, and he has never sought such discovery. The motion for summary judgment is therefore appropriate for decision on the present state of the record. *See Caravan Mobile Home Sales, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 769 F.2d 561, 564 (9th Cir. 1985); *In re Airport Car Rental Antitrust Litigation*, 766 F.2d 1292 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 2248 (1986); *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 297-98 (1968).

Conclusion

For the reasons stated, plaintiffs' claims under the federal antitrust laws are dismissed. Plaintiffs' pendent state law claims are dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

DATED: April 15, 1988

/s/ William W Schwarzer
WILLIAM W SCHWARZER
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IMAGE TECHNICAL SERVICE, INC., a California corporation; J-E-S-P COMPANY, Inc., a New Jersey corporation; SHIELDS BUSINESS MACHINES, INC., a Pennsylvania corporation; MICROGRAPHIC SERVICES, INC., a Missouri corporation; MICRO MAINTENANCE, INC., an Illinois corporation; ATLANTA GENERAL MICROFILM CO., INC., a Georgia corporation; ROGER KATONA, doing business as G. & S. Electronics; AMTECH EQUIPMENT MAINTENANCE, INC., a Minnesota corporation; ADVANCED SYSTEMS SERVICES, INC., a Colorado corporation; B.C.S. TECHNICAL Services, Inc., a Colorado corporation; BOB INGLE, INC., a Missouri corporation; DATA PROX EQUIPMENT CO., a New Jersey corporation; FISHER MICROGRAPHICS, INC., a Missouri corporation; I.O.A. DATA CORP., a New York corporation; SEARLE ENTERPRISES, doing business as Micro Image, Inc.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC., a Minnesota corporation; OMIN MICROGRAPHIC SERVICES, INC.; and CPO, LTD., a California corporation, Plaintiffs-Appellants, v. EASTMAN KODAK CO., a New Jersey corporation, Defendant-Appellee.	No. 88-2686 D.C. No. CV-87-1686-WWS ORDER (FILED SEP 21 1990)

Before: CHAMBERS, WALLACE, and WIGGINS, Circuit Judges

The panel has voted to deny the petition for rehearing. Judge Wiggins votes to reject the suggestion for rehearing en banc. Judge Wallace votes to grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.)

LIST OF PENDING CASES RAISING IDENTICAL *PER SE* TYING AND MONOPOLIZATION CLAIMS IN SINGLE BRAND AFTERMARKETS

FIRST CIRCUIT

Picker International, Inc. v. Bruce Leavitt, Imaging Equipment Services, Inc. and Thomas J. Quinn, Nos. 87-2828WF, 87-2597 (D. Mass. filed 1987).

Data General Corp. v. Grumman Systems Support Corp., No. 88-0033-S (D. Mass. filed 1988).

Computer Products & Repair, Inc. v. Data General Corp., et al. Civ. Action 89-0357S (D. Mass. filed Feb. 16, 1989).

THIRD CIRCUIT

Allen-Myland, Inc. v. International Business Machines Corp., 693 F. Supp. 262, 1988 Trade Cases (E.D. Pa. 1988); 746 F. Supp. 520 (E.D. Pa. 1990).

FOURTH CIRCUIT

Abcor Corp. v. AM International, Inc., 916 F.2d 924 (1990).

Service & Training, Inc. v. Data General Corp., 737 F. Supp. 334 (D. Md. 1990).

FIFTH CIRCUIT

Electronics in Medicine, Inc. v. Picker International, Inc., No. H-88-1400 (S.D. Texas filed 1988).

SIXTH CIRCUIT

Virtual Maintenance, Inc. v. Prime Computer, Inc., No. 89 CV 71762 DT (E.D. Mich.) (Judgment entered Nov. 15, 1990), *appeal filed*, No. 90-2249 (6th Cir. filed Nov. 16, 1990).

HyPoint Technology, Inc. v. Hewlett-Packard Co., No. C 87-2484 (N.D. Ohio 1987); *appeal filed*, No. 90-3526 (6th Cir. filed June 1, 1990).

EIGHTH CIRCUIT

Financial Prods. Corp. v. Unisys Corp., No. 90-0-143 (D. Neb. filed March 8, 1990).

NINTH CIRCUIT

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(4)

No. 90-1029

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICE, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, d/b/a G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICE, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, INC., d/b/a MICRO IMAGE; MIDWEST MICROFILM EQUIPMENT & SERVICES, INC.; OMNI MICROGRAPHIC SERVICES INC.; AND CPO LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was error for the Court of Appeals to reverse a summary judgment, granted after minimal discovery, against plaintiff independent service organizations ("ISOs") on their *per se* claim under section 1 of the Sherman Act, where the limited record developed in the District Court, considered in the light most favorable to plaintiffs, showed that (a) the defendant manufacturer had tied the availability of repair parts for its photocopy and micrographic machines to the agreement of its customers not to purchase service from ISOs, (b) competition in the interbrand machine market had not prevented the manufacturer from successfully forcing its service on a large number of its customers, and (c) the manufacturer's service was in many cases not wanted by these customers, as evidenced by the fact that the manufacturer charged twice as much for service as did ISOs, its service was on occasion inferior to that offered by ISOs, and the manufacturer had on occasion reduced its service prices in response to competition from ISOs.

2. Whether it was error for the Court of Appeals to reverse a summary judgment, granted after minimal discovery, against plaintiff ISOs under section 2 of the Sherman Act, where the limited record developed in the District Court, considered in the light most favorable to plaintiffs, showed that (a) repair parts controlled by the defendant manufacturer are essential components for the repair of defendant's micrographic and photocopy machines, (b) the manufacturer's control over parts gives it monopoly power in the market for service of its machines, and (c) the manufacturer had changed its prior

QUESTIONS PRESENTED – Continued

policy of selling parts to ISOs and had presented no legitimate business justifications for its change of policy.

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No. 90-1029

In The

Supreme Court of the United States

October Term, 1990

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICE, INC., ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Parties and the Photocopy – Micrographic Service Market

This case concerns competition between petitioner Eastman Kodak Company ("Kodak"), one of the largest manufacturers of photocopy and micrographic machines, and the 18 respondent independent service organizations

("ISOs")[1], in the market for servicing Kodak photocopy and micrographic equipment.[2]

This service market is a large and lucrative one for Kodak, because the cost of service and supplies exceeds the cost of the equipment over its useful life. Kodak does not have a dominant share in either the market for photocopy or micrographic equipment, but Kodak acknowledged below that it does have about 23% of the market for high-volume photocopy machines, and somewhat less than 20% of the market for micrographic machines. Petitioner's Appendix ("Pet. App.") at 8A, n.3.

Until the early 1980s, Kodak had little competition for the servicing of its equipment. Beginning in the early 1980s, however, many ISOs were formed. *Id.* at 3A. These small businesses were able to become profitable and grow by offering service equal to or better than Kodak's, at a price substantially less than Kodak's.

Until 1985, the number of ISOs grew rapidly. *Id.* This was not surprising in view of the price and quality of service offered. In several cases, ISOs agreed to provide service to customers having a large number of Kodak machines at one-half the price quoted by Kodak. *Id.* at 10A. The quality of the service was also good, as evidenced by the fact that one ISO was asked to bid for additional State of California business after providing superior service under its initial contracts with the State.

In order to compete with Kodak, the ISOs found it necessary to buy and to maintain stocks of spare parts, which were available only from Kodak itself or from third-party manufacturers who made the parts pursuant to contracts with Kodak. *Id.* at 3A.

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[1] The caption of the petition identifies all parties in the lower court. The 18 respondents have no corporate parents and no subsidiaries other than wholly-owned subsidiaries.

[2] Micrographic equipment is used to make, store, retrieve, read or print a micro image such as microfilm or microfiche.

Until 1985, Kodak imposed no restrictions on who could buy its micrographic parts (provided the customers were credit-worthy), nor did it discriminate among micrographic parts customers as to price or availability. In 1985, however, Kodak changed its policy. It announced that henceforth, it would not sell replacement parts to ISOs for its new micrographic products at all. *Id.* In 1986, Kodak announced that even as to "old" micrographic equipment, it would sell parts only to established ISO customers, such orders would not be filled as promptly as before, certain classes of parts that rarely broke down would no longer be sold to ISOs, and the previous discount for non-rush orders would be eliminated. ISOs who serviced Kodak photocopy machines experienced a similar constriction of parts availability.[3]

In late 1986, Kodak formalized its change in parts policy by modifying its sales contracts with machine owners. The new agreement expressly provided that Kodak would sell replacement parts *only* to customers who serviced their own machines and did not use ISOs. In other words, by late 1986, Kodak formally conditioned the availability of repair parts on its customers' agreement *not* to purchase service from ISOs.

After unsuccessful attempts to negotiate with Kodak, the respondents filed the instant antitrust suit in April of 1987.

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[3] Kodak claimed in the District Court that it has never knowingly sold photocopy replacement parts to ISOs since entering the photocopy business in 1975. Respondents dispute this, because at least some ISOs were able to purchase spare parts for copiers directly from Kodak without restrictions until Kodak began to lose significant service business to these ISOs. Pet. App. 13A-14A.

B. The Proceedings Below

1. The Summary Judgment in the District Court

Four months later, in August of 1987, before any discovery had been conducted, Kodak moved for summary judgment in the District Court. In response to Kodak's motion, the District Judge permitted the ISOs to propound one set of interrogatories and serve one request for production of documents on Kodak, as well as to take "no more than four depositions." Pet. App. 36B. The District Judge subsequently permitted the ISOs' counsel to take two additional depositions on the issue of market power, but no other discovery was permitted before Kodak's motion was ruled upon.[4] The ISOs' evidence on the summary judgment motion consisted mainly of declarations from ISO personnel detailing the facts set forth above. ISOs' counsel requested further discovery pursuant to F.R.C.P. 56(f), but this was denied.

On April 15, 1988, the District Court (without hearing oral argument) granted Kodak's summary judgment motion in its entirety. Despite the complaint's allegations that Kodak had tied its parts to service, the District Court found no tie-in under section 1 of the Sherman Act, 15 U.S.C. § 1:

> There is no evidence of any [tying] arrangement in this case. In selling its copiers and imaging equipment, Kodak does not require the buyer to agree to purchase parts or service from Kodak. Nor does it condition the sale of one product on the buyer's purchase of another product . . . A Kodak customer can buy equipment without having to buy parts; and he can buy part[s] if he simply owns Kodak equipment.

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[4] Even this description of the limited discovery permitted is somewhat misleading, because Kodak objected to many of the ISOs' interrogatories and document requests. When the ISOs sought to move to compel responses, the District Judge refused to entertain the motion.

Pet. App. 32B-33B (citations omitted). The District Court treated Kodak's refusal to sell replacement parts to ISOs simply as an exercise of "the right of a manufacturer unilaterally to select its customers and to refuse to sell to others." *Id.* at 33B.

The District Judge was equally dismissive of the ISOs' monopolization and attempted monopolization claims under section 2 of the Sherman Act, 15 U.S.C. § 2:

> Plaintiffs contend that Kodak has a dominant share of a purported market for servicing Kodak copiers and micrographic equipment. Assuming without deciding that such a market can be found to exist and that Kodak has market power in it, plaintiffs have not come forward with any facts to suggest that Kodak has attempted to leverage power in that market to gain competitive advantage in another market.

Id. at 35B.

2. The Reversal of the Summary Judgment By The Ninth Circuit

On May 1, 1990, the Ninth Circuit, in a 2-1 decision, reversed the summary judgment granted by the District Court. After noting that a tie-in can exist not only where a seller conditions the availability of one product on the buyer's agreement to purchase a second, but also where the buyer "agrees that he will not purchase that [second] product from any other supplier," *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958), the Ninth Circuit agreed with the respondents here that the District Court had misperceived the tie, because "Kodak has tied parts to service, not equipment to parts or parts to equipment." Pet. App. 4A-5A.

The Court of Appeals rejected Kodak's argument that, as a matter of law, parts and service could not comprise separate markets:

> Kodak's argument presents, at best, a disputed issue of fact. That products must be used

> together does not eliminate the possibility that they form distinct markets . . . Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service. Kodak does not dispute appellants' claim that some equipment owners have (perhaps surreptitiously) bought service from ISOs and parts from Kodak. Nor does Kodak dispute appellants[']claim that other equipment owners would have contracted with ISOs for service if they could have obtained parts separately.

Pet. App. 6A-7A (citations omitted).

The Court of Appeals also rejected Kodak's argument that, as a matter of law, vigorous competition in the interbrand market for equipment meant that Kodak could not have sufficient economic power to force an illegal tie in the "aftermarket" for parts. Although acknowledging Kodak's point that competition in the equipment market might be shown to cause Kodak customers to switch to a different equipment brand if Kodak attempted to tie "supercompetitively priced service to parts," the Ninth Circuit concluded this issue could not be resolved on the record before it. Noting that the District Judge had "permitted only very limited discovery on the market power issue," *id.* at 10A, n.4, the Court of Appeals said:

> [W]e cannot uphold the district court's grant of summary judgment on this theoretical basis. Not only do we lack the benefit of the district court's consideration of the market power issue, we are presented with a record that was not fully developed through discovery on this issue. Furthermore, market imperfections can keep economic theories about how consumers will act from mirroring reality. *See Jefferson Parish*, 466 U.S. at 15 n.24 . . . (noting that market imperfections can keep consumers from seeing the price

> and quality implications of a tying arrangement). While appellants have not conducted a market analysis and pin-pointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality. It is enough that appellants have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market.

Id. at 10A (citations and footnote omitted).

The Ninth Circuit closed its discussion of the tie-in issue by noting that as to the three business justifications[5] Kodak had offered for its parts policy – to insure the best service, reduce inventory costs and prevent free-riding by ISOs on Kodak's investment in parts – a reasonable trier of fact could find that the first was both pretextual and not the least restrictive alternative available, the second was clearly pretextual, and the third was insufficient as a matter of law. Pet. App. 12A-15A.

The Ninth Circuit also reversed the summary judgment granted against the ISOs on their claims under section 2 of the Sherman Act. Noting that a monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate

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[5] Under Ninth Circuit precedents, a tying arrangement "does not violate the antitrust laws 'if implemented for a legitimate business reason and if no less restrictive alternative is available.'" *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1349 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 179 (1988); *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 739 (9th Cir. 1981).

business justification, and that a monopolist may not deny a competitor access to an "essential facility", the Court of Appeals concluded that the ISOs' evidence, as summarized above, raised triable issues under both of these theories. Pet. App. 16A-17A. And for essentially the same reasons that it had rejected Kodak's business justifications on the tying claim, the Court also rejected them as defenses to the monopolization claims. *Id.* at 17A-18A.

Judge Wallace in his dissent conceded the ISOs had "raised triable issues as to whether Kodak's business practices constitute a tying arrangement." *Id.* at 20A. However, he agreed with Kodak's theoretical model that it could not have market power in the "derivative aftermarket for replacement parts." *Id.* at 20A-25A. With respect to the section 2 claims, he concluded that Kodak's alleged business justifications were sufficient to defeat liability.

Kodak's petition for rehearing and suggestion for rehearing *en banc* was denied on September 21, 1990, with no judge of the court requesting a vote on it.

REASONS FOR DENYING THE WRIT

Summary of Argument

In its petition for certiorari, Kodak ignores the evidence that the Ninth Circuit held sufficient to raise triable issues on the question of market power under respondents' tie-in theory and monopoly power under respondents' monopolization theory. Instead, Kodak urges the Court to substitute "perfect-world" economic theory for imperfect reality and hold *as a matter of law* that so long as a manufacturer competes in the interbrand equipment market, it cannot have sufficient economic power to impose an unlawful tie or to monopolize in any derivative "aftermarket", whether for parts, service or otherwise.

Even if such a broad ruling could ever be justified, this is plainly not the case in which to announce it. The

Ninth Circuit reversed the summary judgment below because the meager record that respondents were permitted to develop convinced the Court of Appeals that the actual "aftermarkets" in which Kodak competes had not behaved as Kodak's economic theory would suggest. Because a motion for summary judgment should be granted only after the party opposing the motion has had "an opportunity to make full discovery," *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), and because that opportunity was denied here, the Court of Appeals' conclusions about the triable issues raised by Kodak's tying arrangements and monopolization should not be disturbed.

Kodak is wrong in arguing that the decision below is inconsistent with this Court's analysis of tying arrangements in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1986). In *Jefferson Parish*, the Court was careful to point out that while the market imperfections in the record before it were insufficient to create the requisite economic power in the market for hospital services, some market imperfections – such as imperfect consumer information – can cause buyers "not [to] be fully sensitive to the price or quality implications of a tying arrangement," thus "imped[ing] competition on the merits." 466 U.S. at 15, n.24. That is precisely the situation the Ninth Circuit faced here: because Kodak changed its long-standing policy and practice on parts availability, no one who purchased Kodak photocopiers or micrographic equipment before the change could have accurately estimated the increased service costs that would be brought about by Kodak's unanticipated tying behavior.

Nor is Kodak convincing when it argues that certiorari is appropriate because the decision below conflicts with decisions from other circuits, such as *Grappone v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988) and *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986). These cases do not lay down a general rule that interbrand competition precludes a finding of

economic power in "aftermarkets"; they simply hold that on the varying facts presented, the tie-ins at issue were lawful.

Kodak is also wrong in contending that the decision below contravenes the standards for summary judgment announced in *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986). As this Court held in *Celotex*, summary judgment should not be granted in any case governed by Rule 56 until the party opposing the motion has had "an opportunity to make full discovery." 477 U.S. at 326. *Matsushita* is not inconsistent with this general principle; it stands only for the proposition that where an antitrust plaintiff who has conducted full discovery alleges an "implausible" conspiracy, that plaintiff must come forward in its opposition to the motion "with more persuasive evidence to support [its] claim than would otherwise be necessary." 475 U.S. at 587. *Matsushita* does *not* hold that in all cases where economic theory suggests that an unlawful restraint on competition is unlikely to occur, discovery can be denied even in the face of evidence that is contrary to the theory. In view of the Ninth Circuit's conclusion that respondents' evidence of economic reality was contrary to Kodak's economic theory, it was not error to reverse the summary judgment and to allow discovery to proceed.

Kodak's argument that the law uniformly protects refusals by a supplier to deal with a competitor was rejected by this Court in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985), and by the Ninth Circuit below. Under certain facts, which the panel below found to be triable issues of fact in this case, such refusals to deal can be illegal under section 2 of the Sherman Act. These facts include (1) Kodak's prior policy and practice of supplying parts to ISO competitors, (2) Kodak's reversal of its policy in response to ISOs' competition through high-quality/low-priced service, (3) Kodak's targeting and impacting ISOs and, (4) a lack of legitimate business justifications for Kodak's actions. Review should be

denied to allow respondents the opportunity for full discovery on these issues.

Kodak's attempt to avoid these facts, by relying on an abstract economic theory that interbrand competition in equipment obviates the need to worry about market power in parts or service aftermarkets, is contrary to this Court's standards in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) and *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) the U.S. Department of Justice Merger Guidelines and the facts in this case.

Likewise, whether Kodak's alleged "business justifications" are the real ("legitimate") reasons for Kodak's actions, or whether they are merely "pretextual", because anticompetitive reasons predominate, cannot be reviewed without a full factual record, as existed in *Aspen Skiing* and all other cases relied upon by Kodak.

I. THE OPINION BELOW IS CONSISTENT WITH OTHER DECISIONS HOLDING THAT SUMMARY JUDGMENT SHOULD NOT BE GRANTED IN ANTITRUST CASES UNTIL THE PLAINTIFF HAS BEEN AFFORDED AN OPPORTUNITY TO CONDUCT ADEQUATE DISCOVERY

Kodak contends that resolution of the issues raised in its petition "is critical to manufacturers in high technology industries," and that without a ruling now from this Court that manufacturers in the interbrand equipment market may freely impose tying arrangements or monopolize in "aftermarkets" for their products, there will be a "chilling impact . . . on procompetitive innovation". Petition, pp. 10, 11.

One would scarcely guess from reading this apocalyptic rhetoric that the case at issue was decided not on the basis of a full trial record, but rather on summary judgment after very limited discovery. Indeed, it is not until page 22 of its petition (at footnote 8) that Kodak even hints that the record before the District Court was based upon one limited set of interrogatories, one limited

round of document production, and six depositions. *See* Pet. App. 36B-37B.

Under these circumstances, it is clear that the Ninth Circuit did not err in reversing the summary judgment granted by the District Court, because Kodak's motion for summary judgment was premature. As noted above, it was made just four months after filing of the complaint, before any discovery had been conducted. In *Celotex*, this Court pointed out that such premature motions should be

> dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, *if the non-moving party has not had an opportunity to make full discovery.*

477 U.S. at 326 (emphasis supplied). Perhaps if the District Court had followed that course of action here, it would not have misperceived the nature of the tie-in that respondents alleged. *Compare* Pet. App. 5A with 32B-33B.

The Court of Appeals' decision is not only consistent with *Celotex*, but also with a long line of other Court of Appeals decisions in which summary judgments have been reversed for allowing plaintiffs little or no discovery. *See Intern. Raw Materials v. Stauffer Chemical*, 898 F.2d 946, 949 (3d Cir. 1990) (summary judgment reversed where plaintiff denied discovery on facts concerning alleged Webb-Pomerene Act antitrust exemption); *Mannington Mills v. Congoleum Industries, Inc.*, 610 F.2d 1059, 1073-74 (3d Cir. 1979) (summary judgment on antitrust claim reversed where plaintiff had been allowed no discovery in antitrust phase of combined patent/antitrust case); *Egelston v. State University College at Geneseo*, 535 F.2d 752 (2d Cir. 1976) (summary judgment reversed where plaintiff in Title VII case had been allowed no discovery on facts concerning limitations period); *Ward v. United States*, 471 F.2d 667, 670 (3d Cir. 1973) (summary judgment reversed in Federal Tort Claims Act case where government affidavits left open the possibility of operational negligence in jet aircraft flight, and plaintiff had requested a continuance under Rule 56(f)).

Until the contours of the tie-in and monopolization alleged by respondents and the business justifications offered by Kodak have been fleshed out through further discovery, the Ninth Circuit's decision cannot be properly reviewed, nor does it provide a basis for the broad rulings that Kodak seeks.

II. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S ANALYSIS OF TYING ARRANGEMENTS IN *JEFFERSON PARISH*

The principal thrust of Kodak's attack on the decision below is its alleged inconsistency with the tests for market power in *Jefferson Parish*. Leaping upon the Ninth Circuit's common-sense observation that "market imperfections can keep economic theories about how consumers will act from mirroring reality," Pet. App. 10A, Kodak asserts that the Court of Appeals substituted "speculative inferences about unidentified market imperfections" for the careful analysis of economic power in the tying product market that *Jefferson Parish* requires to show a *per se* tying violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Petition, p. 16.

Kodak's argument is without merit. It reflects a highly selective reading of *Jefferson Parish*, emphasizing that case's resolution of the specific facts before it while ignoring the case's more general, but equally important, teachings about the role of market imperfections in tying analysis. Kodak's argument also ignores the record in this case, which – limited though it was – clearly suggested to the Ninth Circuit the presence of market imperfections similar to those referenced in *Jefferson Parish*.

The Ninth Circuit's reference to market imperfections was not pulled out of thin air. It was taken from footnote 24 of *Jefferson Parish*, in which the Court elaborated on its statement about how, in an unlawful tying situation, consumers can be harmed by the foreclosure of competition in the market for the tied product. In footnote 24, the Court said:

> Especially where *market imperfections* exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, and hence it may impede competition on the merits. *See* Craswell, [Tying Requirements in Competitive Markets: The Consumer Protection Issues, 62 B.U.L. REV. 661,] at 675-679.

466 U.S. at 15, n.24 (emphasis supplied).

The law review article cited in footnote 24 lists a number of imperfections that may engender power in the market for the tying product, and at least two of them correspond with the facts here. The article notes that one market imperfection is:

> [D]iscovering whether or not a tie will even be imposed . . . In a number of recent cases . . . buyers have alleged that they were forced to buy the tied product . . . by the seller's threat to cut off the supply of the tying product after the initial purchases had already begun . . .
> . . . Obviously, there will be no harm if the buyer can switch to some other source for the tying product when the original seller begins to insist on a tie. In some cases, though, the buyer would encounter significant transaction costs in switching to another supplier . . . Conceivably, the [seller] could then introduce new tying requirements that the [buyer] would not have originally agreed to, up to the point where the cost of such requirements exceeds the cost of switching to a different [seller's] system.

Craswell, *supra*, at 674-75.

The facts before the Ninth Circuit showed that this circumstance applies to owners of Kodak machines. As the Ninth Circuit said, "some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems." Pet. App. 11A.

Another market imperfection described in the Craswell article concerns buyers who are not prescient about future costs:

> The simplest explanation for tie-ins which do not benefit buyers is that the buyer was not aware of what he was agreeing to. This may be due . . . to the difficulty in calculating in advance of the sale just how much a tie-in is likely to cost over the course of the contract . . . The important point for the moment is that so long as buyers do not *perfectly understand* the tying arrangement, they will get into some ties that they would have preferred to stay out of, and which would represent a net efficiency loss.

Craswell, *supra*, at 672 (footnote omitted; emphasis supplied).

The evidence before the Ninth Circuit showed that this circumstance also applies to owners of Kodak machines: prior to 1985, Kodak imposed no restrictions on the sale of repair parts. Pet. App. 3A. A customer who purchased a Kodak machine before that time could not have accurately estimated the costs of the tying arrangement that Kodak now imposes.

Kodak is correct in stating that in *Jefferson Parish*, the Court found the market imperfections before it insufficient (along with the defendant hospital's 30% market share) to create market power in the tying product market. However, the basis for that conclusion was *not* – as Kodak implies – that market imperfections never matter, but rather that the imperfections identified by the Fifth Circuit were irrelevant:

> Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made. [The] lack of price or quality competition [identified by the Fifth Circuit] does not create this type of forcing. If consumers lack price consciousness, that fact will not force them to take an anesthesiologist whose services they do not want – their indifference to price will have no impact on their willingness or ability to go to another hospital where they can utilize the services of the anesthesiologist

> of their choice. Similarly, if consumers cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement . . .

466 U.S. at 27-28.[6]

The Ninth Circuit was correct when it concluded that the market imperfections suggested by the record here *do* matter, and Kodak has presented no sound reason for disturbing that conclusion in the absence of full discovery.

In addition to arguing that the decision below is contrary to *Jefferson Parish*, Kodak asserts that the Ninth Circuit's alleged analytical flaws were "exacerbated" by the panel's reliance on the "questionable decision" in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). In *Digidyne*, the Ninth Circuit held that the power in the tying product market, a copyrighted operating system, was enhanced by the huge investment customers had made to develop applications software that worked only with this operating system. Thus, these customers could not easily switch to other systems – they were "locked in" – when the manufacturer conditioned availability of its operating system, the tying product, on the customers' agreement to purchase only its brand of central processing units, the tied product. 734 F.2d at 1342-43.

Kodak is correct that the decision below is based in part on evidence showing that Kodak machine customers are also "locked-in". Kodak is also correct that panels in some circuits have criticized *Digidyne*.[7] What Kodak fails

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[6] In contrast, the evidence before the Ninth Circuit in this case showed that there was substantial price and quality competition between Kodak and ISOs, and that consumers were well aware of and cared about the differences. Pet. App. 3A, 10A-11A.

[7] Other circuits, however, have applied *Digidyne*'s reasoning. *See*, e.g. *Grappone*, *supra*, 858 F.2d at 798.

to note, however, is that the decision in *Digidyne* was based upon the record of a trial that lasted 45 days. *Id.* at 1339. Because the District Judge cut off discovery at such an early stage in this case, the decision below is obviously not a suitable vehicle for reviewing the issues raised by *Digidyne*.

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS CITED BY KODAK

In addition to arguing that the decision below is inconsistent with *Jefferson Parish*, Kodak asserts that the panel's opinion conflicts with several decisions from other circuits, especially *Grappone v. Subaru of New England, Inc., supra*, and *A.I. Root Co. v. Computer/Dynamics, Inc., supra*. Kodak asserts that these cases, along with the Ninth Circuit's own prior decision in *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983), stand for the proposition that "interbrand competition necessarily precludes market power in derivative aftermarkets." Petition, p. 18.

Kodak's claim of a conflict among the circuits cannot withstand close scrutiny. It is evident that *Grappone*, *A.I. Root* and *General Business Systems* do not, alone or together, lay down the broad rule urged by Kodak.

Before considering these cases, it is useful to bear in mind just what the fundamental premise in Kodak's argument is. Judge Wallace's dissenting opinion below clearly recognizes it: that charging excessive prices for service will eventually harm Kodak in the supposedly more lucrative interbrand market for equipment. Pet. App. 20A-23A. This premise ignores the magnitude of service market profits and the damage that an unlawful tie or monopolization actually inflicts in the *short-run* upon competition and consumers in the service market.

Quite apart from this weakness in its theory, the cases cited by Kodak do not support its theory. In *Grappone*, for example, Subaru's New England distributor was

found to have tied the availability of Subaru cars to a Subaru dealer's purchase of parts kits in 1973 and 1974, which included some parts the dealer did not want (and many that it did). 858 F.2d at 793-94. The First Circuit reversed.

The *Grappone* court reviewed the tests for market power in *Jefferson Parish*, and concluded that the distributor met none of them. Since Subaru sold only a tiny percentage of the cars in New England, power in the tying product market (cars) could not be predicated on market share. *Id.* at 797. And since only 3 of the distributor's 64 dealers had protested the alleged over-inclusiveness of the parts kits, market power could not be shown by coercion. *Id.* at 797-98. The Court also noted that the damages plaintiff allegedly sustained by having to buy too many parts were trivial, so market power could not be inferred from any alleged ability on defendant's part to raise prices in the tied product market (parts). *Id.* at 798.

Finally, the First Circuit pointed out the substantial evidence in the record that defendant had developed the parts kit to insure that Subaru dealers would have enough parts on hand to repair the cars in the first year after sale. Given that Subaru was a relatively new entrant into the U.S. car market,

> [T]he record indicates that Subaru was a small firm attempting to break into the industry; it shows that the tie plausibly served the procompetitive purpose of helping the firm develop or maintain sales.

Id. at 799. Thus, the parts policy appeared to come within the well-recognized exception to *per se* liability for tying arrangements imposed to facilitate entry into a new market. *See United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 556-58 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

Grappone not only fails to support the broad rule Kodak claims, but its careful analysis of market power

underscores the correctness of the Ninth Circuit's decision here. As the Ninth Circuit pointed out, there was evidence Kodak had been able to coerce equipment customers into accepting its service, and Kodak was clearly able to exact a significantly higher price for service than did ISOs. Pet. App. 10A-11A.

Kodak's argument also finds no comfort in *A.I. Root*. In that case, a small business alleged that the defendant computer services company had sought to tie the availability of updated software for plaintiff's computer to the plaintiff's agreement to use the software only with equipment manufactured and sold by defendant.

In affirming summary judgment for the defendant, the Sixth Circuit ruled that the necessary power in the tying product market could not be found, because (1) defendant had a very small share in the computer market, and (2) the fact the software was copyrighted was not enough to make it uniquely attractive to buyers. 806 F.2d at 675-77. Moreover, the defendant had sought to impose the tie only prospectively; i.e., on plaintiff's agreement to buy defendant's hardware in the future. *Id.* at 677.

Like *Grappone*, the decision in *A.I. Root* shows the correctness of the ruling below. Unlike Kodak service customers, the plaintiff in *A.I. Root* had the option to and did switch computer brands when the defendant sought to impose a tie. *Id.* at 675. Further, since the tie in *A.I. Root* was prospective only, the plaintiff there was not in the position of Kodak customers, many of whom bought machines before Kodak began refusing to sell repair parts to ISOs for these machines.

In a final effort to support its argument on interbrand competition, Kodak argues that the decision below is inconsistent with the Ninth Circuit's own decision in *General Business Systems*. In that case, a former distributor for Philips small business computers brought suit against

Philips on a variety of antitrust theories.[8] One of these theories was that Philips had tied the availability of service and warranty protection for its computers to agreement by its customers to use only Philips-brand magnetic ledger cards ("mlcs"), an essential component for operating the computers. However, the evidence showed that Philips mlcs were superior to other brands, and that their price did not decline even after Philips abandoned the small computer market and sold its mlc business. 699 F.2d at 977. Since the power to raise prices for the tied product is one of the indicia of an illegal tie, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 513 n.6 (1969) (White, J., dissenting), and since that had not happened with respect to the mlcs, *General Business Systems'* rejection of the plaintiff's tying claim was consistent with conventional tying analysis. Such analysis is not in conflict with the decision below, because the Ninth Circuit noted that in this case, Kodak has been able to extract higher prices for service (the tied product) than the price that prevailed where Kodak had to compete with ISOs. Pet. App. 3A.

IV. THE NINTH CIRCUIT'S DECISION IS NOT INCONSISTENT WITH THE SUMMARY JUDGMENT STANDARDS IN *MATSUSHITA*

In addition to arguing that the opinion below departed from proper tying analysis, Kodak vigorously contends that the Ninth Circuit misapplied the summary judgment standards applicable in antitrust cases. Specifically, Kodak argues that *Matsushita Elec. Indus. Co. v. Zenith Radio, supra,* imposes a heightened burden on an antitrust plaintiff resisting summary judgment, and that if the plaintiff's claim seems contrary to "economic

[8] One of these theories was monopolization. The quotations from *General Business Systems* at page 19 of Kodak's petition are from the Ninth Circuit's discussion of this issue, not the tying claim.

sense", plaintiff can defeat the motion only by coming forward with even more persuasive evidence than would otherwise be necessary. Petition, pp. 20-23.

As noted above, it was Kodak's premature motion and the District Court's failure to allow adequate discovery that are responsible for the lack of a complete factual record. Even if the record below were more fully developed, however, *Matsushita* would not support Kodak.

In *Matsushita*, this Court held, in reliance on *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), that because the plaintiff American manufacturers had alleged an inherently implausible predatory pricing conspiracy by Japanese electronics manufacturers, it was appropriate to require that the plaintiffs produce – after years of discovery – factual evidence that was more consistent with their conspiracy theory than with unilateral action. 475 U.S. at 588-98. Because the plaintiffs were unable to do so, the Court reversed the Third Circuit's decision that summary judgment had been improperly granted.

Since it was decided in 1986, *Matsushita's* requirement that an antitrust plaintiff asserting an economically "implausible" claim "must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary", *id.* at 587, has been confined to conspiracy cases. P. Areeda & H. Hovenkamp, Antitrust Law ¶ 316.1b (Supp. 1990).

Respondents' tie-in and monopolization claims are entirely different from the conspiratorial predatory pricing scheme alleged in *Matsushita*. Here, the key issue is whether Kodak enjoys sufficient economic power in the parts market so that it can *unilaterally* force customers to purchase its service or put ISOs out of business. Because the Ninth Circuit panel found that respondents had presented enough evidence – even given the discovery limitations imposed upon them – to raise triable issues on these questions, its decision is not inconsistent with *Matsushita* and should not be disturbed.

V. COMPETITION IN INTERBRAND EQUIPMENT MARKETS DOES NOT, AS A MATTER OF LAW, PREVENT VIOLATION OF THE SHERMAN ACT IN AFTERMARKETS

Kodak argues that competition in the interbrand market means as a matter of law that "Kodak has no market power and no ability to act anticompetitively in any derivative parts or service aftermarket," and that this prevents it from having market power under section 1 of the Sherman Act or monopoly power under section 2 of the Sherman Act. Petition, p. 9. This argument is fundamentally flawed, as shown by the standards this Court uses to define relevant markets and market power, the Department of Justice Merger Guidelines, and the facts of this case.

A. Relevant Markets Under *du Pont* and *Brown Shoe*

The standards for defining a relevant market or submarket in which competition is measured for antitrust purposes were set forth by this Court in *United States v. E.I. du Pont de Nemours & Co., supra* and *Brown Shoe Co. v. United States, supra.*

In *du Pont* this Court said:

> [T]he relevant market depends upon the availability . . . of alternative commodities for buyers: i.e., whether there is a cross elasticity of demand. . . .

351 U.S. at 380. Cross-elasticity of demand expresses how price movement in one market affects demand for goods or services in other markets. Where the price of one product increases sharply and there is a significant shifting between products, the products are close substitutes and therefore in the same relevant market. The Ninth Circuit properly found the relevant market to be a triable issue of fact in this case, because respondents showed that although Kodak charges up to twice as much as ISOs for service, "some owners of large Kodak equipment

packages will pay higher prices for Kodak service rather than switch to competitors' systems." Pet. App. 11A.

In *Brown Shoe* this Court examined the "practical indicia" of the marketplace in order to define the relevant market. 370 U.S. at 325. These practical indicia include:

> [I]ndustry or public recognition of the submarket . . . , the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *Id.*

The Ninth Circuit applied these tests properly when it found facts that a reasonable trier of fact might consider sufficient to prove that an "aftermarket" can be a relevant market under the *Brown Shoe* "practical indicia" standard.

B. The Flawed Kodak Economic Theory

Kodak, *amici* and Judge Wallace's dissent in the Ninth Circuit place great reliance on the theory, set out in the dissent of Judge Posner in *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228 (7th Cir. 1988), *cert. denied*, 110 S.Ct. 141 (1989), that interbrand equipment competition always prevents "monopoly power" or even "market power" in a parts or service aftermarket.[9]

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[9] Although Judge Posner would substitute theory for facts, the majority in *Sterling* did not. It affirmed a jury verdict that Sterling had engaged in a *per se* tie-in by conditioning sale of its unique parts on plaintiff's purchases of motors. 866 F.2d at 232-34. Plaintiffs in *Sterling* were prospective "buyers" of new motors who had alternative suppliers, not like "owners" of Kodak equipment needing parts and service who do not have alternative suppliers. *See Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480 n.3 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987) ("[A]n owner of broken Bell & Howell micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the owner's only option is to request service from Bell & Howell [or an ISO] . . . that is obviously the market he faces").

This theory does not match reality. Kodak admits the reality is that "Kodak can charge supercompetitive prices" in the service market. Petition, p. 22.

In order to try to save its theoretical economic argument, Kodak is then forced to argue, without any factual basis in the record, that charging supercompetitive prices for service could only be done in the "short run", because such a policy would be "suicidal" in the interbrand equipment market. From this, Kodak then concludes, as Judge Posner did, that this would only result in a "brief perturbation in competitive conditions [which] is not the sort of thing the antitrust laws do or should worry about." Petition, p. 8.

Not only does Kodak fail to support factually its theory that interbrand competition would keep tie-ins or monopolization in aftermarkets "small" and "short-lived," but the U.S. Department of Justice Merger Guidelines and the facts before the Ninth Circuit suggest exactly the opposite. In the Guidelines the Department of Justice has determined that market power may exist if a competitor can raise prices by a significant amount over the competitive level (generally *five percent*) for a significant time (generally *one year*).[10] The record here shows that Kodak was able to exact a price for service *one hundred percent* over competitive levels *for several years* before ISOs came into the picture (as well as after ISOs appeared, because of the Kodak actions challenged here). Pet. App. 3A. With the large service market for Kodak machines and the high cost of Kodak service, the "brief perturbation" caused by Kodak's practices in this case has, and likely will, cost consumers of Kodak service hundreds of millions of dollars in anticompetitive exactions if it continues. This is something the antitrust laws do, and should, "worry about." The markets for Kodak parts and service are relevant markets and the evidence below suggests that Kodak has unlawfully exercised market and monopoly power in them.

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[10] U.S. Department of Justice Merger Guidelines, June 14, 1984, Section 2.11.

VI. TRIABLE FACTUAL ISSUES WERE RAISED WHETHER KODAK UNLAWFULLY MAINTAINED MONOPOLY POWER IN SERVICE FOR KODAK MACHINES IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT

Section 2 of the Sherman Act prohibits the creation or the maintenance of a monopoly through unlawful means. It prohibits "exclusionary", "anticompetitive" or "predatory" conduct by a monopolist. This Court defined such conduct in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.* 472 U.S. 585 (1985) as:

> [B]ehavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."

Id. at 605 n.32 (quoting 3 P. Areeda & D. Turner, Antitrust Law, ¶ 626b at 78 (1978)).

In *Aspen Skiing*, this Court held that a monopolist may not unilaterally refuse to deal in order to discontinue long-standing policies which are important to the character of a market, if the refusal is a deliberate effort to discourage customers from doing business with its smaller competitors. 472 U.S. at 610. Such "an important change in the character of the market", *id.*, by a monopolist is subject to close scrutiny under the antitrust laws because:

> [I]n any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs.

Id. at 604, n.31.

Using the close scrutiny described above, this Court in *Aspen Skiing* upheld the jury's determination that the

defendant's withdrawal of cooperation for joint lift tickets was for the purpose of harming its smaller competitor, not for the defendant's alleged business reasons. *Id.* at 608. The Court said:

> Thus the evidence supports an inference that [defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.

Id. at 610-611.

Kodak's reliance on *Olympia Equip. Leasing Co. v. Western Union Telegraph*, 797 F.2d 370 (7th Cir. 1986) is therefore misplaced. Petition, pp. 27, 29. *Olympia* involved a monopolist's undisputed efforts to relinquish its monopoly in the relevant market. This was found to be a legitimate justification for its discontinuance of prior policies. 797 F.2d at 378. The facts in *Olympia* are in striking contrast to the evidence of Kodak's behavior, which was intended to allow Kodak to completely monopolize the Kodak service market, not to relinquish Kodak's participation in that market.

Moveover, the *Olympia* opinion expressly distinguished its facts from cases like the present one in which the monopolist's acts injure a competitor who is also a customer. *Olympia* explained:

> The monopoly supplier who retaliates against customers who have the temerity to compete with him, by cutting such customers off, is severing a collateral relationship in order to discourage competition. *Id.* at 376.[11]

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[11] *See also, Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973) (use of monopoly power "to destroy threatened competition" violates § 2); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951) (right to refuse to deal does not extend to situations where defendant acts with intent to create or maintain a monopoly); *Oahu Gas Service, Inc. v. Pacific*

(Continued on following page)

The facts before the Ninth Circuit, although not as fully developed as the trial record in *Aspen Skiing*, would allow a reasonable trier of fact to conclude that, as in *Aspen Skiing*: (1) Kodak had "discontinued a long standing policy" and had changed an established "pattern of distribution" with regard to the sale of parts to ISOs; (2) Kodak had directly targeted and impacted its smaller ISO rivals; and (3) Kodak was "not motivated by efficiency concerns".

Obviously, the question of what constitutes an unlawful refusal to deal is a factual inquiry. As the panel below found, the District Court's premature cut-off of discovery prevented a full factual inquiry into the relevant market and market power.

VII. TRIABLE FACTUAL ISSUES WERE RAISED WHETHER KODAK'S ALLEGED BUSINESS JUSTIFICATIONS WERE PRETEXTUAL AND NOT LEGITIMATE

Whether anticompetitive conduct violates section one[12] or section two[13] of the Sherman Act also depends

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Resources, Inc., 838 F.2d 360, 368 (9th Cir.), *cert denied*, 488 U.S. 870 (1988) (antitrust laws impose "affirmative duties" on monopolists to aid competitors under certain circumstances).

[12] In a section 1 tying case, the burden of proof is on the defendant with regard to business justifications. See note 5, *supra*.

[13] In a section 2 violation, the burden of proof is on the plaintiff to show that defendant's actions were not predominantly motivated by legitimate business purposes. *Aspen Skiing*, 472 U.S. at 604-612; *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1339 (9th Cir. 1983) (plaintiff must show defendant's acts "were predatory and not *predominantly* motivated by legitimate business purposes") (emphasis supplied); *Lektro Vend Corp. v. Vendo Co.*, 660 F.2d 255, 273 n.20 (7th Cir. 1981) *cert. denied*, 455 U.S. 921 (1982).

on whether the "business justification" offered by the monopolist is "legitimate". Under *Aspen Skiing*, this is obviously a factual inquiry. 472 U.S. at 604.

In *Aspen Skiing*, this Court applied a "predominance" standard to evaluate the "legitimacy" or "validity" of the "justifications" offered by defendant. The Court reasoned:

> Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose . . . The jury may well have concluded that Ski Co. elected to forego these short-run [business] benefits because it was *more interested* in reducing competition in the Aspen market over the long run by harming its smaller competitor.

Id. at 608. (Emphasis supplied.)

Respondents presented the same type of evidence below from which a jury could find under *Aspen Skiing* standards, that Kodak's alleged business "justifications" were invalid, including: (1) a prior course of unrestricted business dealings with competitor ISOs; (2) a change of policy by Kodak that was "an important change in the character of the market," (3) a substantial impact on competitor ISOs; and (4) a substantial impact on the relevant consumers, Kodak equipment owners. *Id.* at 605.[14]

In *Aspen Skiing*, defendant Ski Co. offered a "justification" like Kodak's first "justification", to wit, a "desire to disassociate itself from . . . inferior [skiing] services." *Id.* at 609-610. This was rejected by the *Aspen Skiing* Court,

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[14] *Aspen Skiing* additionally set out types of anticompetitive evidence, also presented by respondents in this case, that can refute a monopolist's proffered business justifications, including: (1) statements made by officers or agents of the company, (2) evidence that the conduct was used threateningly and did not continue when a rival capitulated, and (3) evidence that the conduct was not related to any efficiency. *Id.* at 608 n.39.

because preserving the consumers' opportunity to choose between competitors "allowed consumers to make their own choice on these matters of quality." *Id.* at 610. Respondents also presented substantial evidence directly refuting Kodak's claim of higher quality Kodak service. Pet. App. 3A, 10A.

Kodak's second "justification" – reduction of Kodak's inventory costs – was found by the panel below to be clearly pretextual. Kodak has not rebutted respondents' logic, adopted by the Ninth Circuit, that "equipment owners' need for Kodak-supplied parts is determined only by the frequency of [Kodak] equipment failure," Pet. App. 14A. Kodak's alleged "justification" here simply makes no economic sense. Kodak must inventory parts based on the Kodak machine population and its frequency of failure. Kodak may even inventory more parts if it services all Kodak machines rather than shares service with ISOs, since ISOs inventory some Kodak parts themselves.

Kodak's third "justification", to prevent alleged "free riders" from buying parts from Kodak and then competing with Kodak for service, was found by the Ninth Circuit to be an insufficient justification "as a matter of law." Pet. App. 14A. Moreover, it is wholly disingenuous, because the record below showed that Kodak makes high profits from the sale of its parts to ISOs.

Every case relied upon by Kodak to support the "legitimate business justification" defense involved a complete factual record upon which to evaluate the "predominance" of proffered business justifications or predatory conduct.[15] Such a record does not exist in this case.

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[15] *Mozart Co. v. Mercedes-Benz of North America, Inc., supra* (substantial evidence at trial supported jury finding of predominance of defendants' business justification); *Calculators Hawaii, Inc. v. Brandt, supra* (plaintiff failed to proffer *any* evidence of anticompetitive intent at trial); *Oahu Gas Service,*

(Continued on following page)

There are clearly triable issues of fact as to whether Kodak's actions "were predatory and not predominantly motivated by legitimate business purposes."

CONCLUSION

Kodak's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: January 22, 1991

(Continued from previous page)

Inc. v. Pacific Resources, Inc., supra (defendant proved clearly at trial a predominant economic justification); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F. 2d 1101 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 473 (1990) (judgment NOV after jury trial that obtaining lowest prices for consumers was valid business justification); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, (9th Cir.), *cert. denied*, 475 U.S. 1087 (1986) (directed verdict after jury trial because plaintiff had failed to produce sufficient evidence of liability and defendant's business justifications were found to be valid).

Kodak's cite to *Bell v. Dow Chem. Co.*, 847 F.2d 1179 (5th Cir. 1988) is misleading since the Fifth Circuit found as to the business justification that " . . . significant evidence [by plaintiff] undercutting the credibility of the justifications by Dow," created inconsistences which "raise an issue of fact as to whether Dow had a justified purpose", and that this "should be left to a jury." *Id.* at 1186.

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No. 90-1029 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1990

EASTMAN KODAK COMPANY, PETITIONER

v.

IMAGE TECHNICAL SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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73 p.

QUESTION PRESENTED

Whether the court of appeals erred in reversing a grant of summary judgment for a defendant equipment manufacturer alleged to have committed a violation of Section 2 of the Sherman Act and a per se violation of Section 1 by denying independent service organizations access to replacement parts for its equipment and by tying parts to service, when the manufacturer concededly lacked market power in the interbrand market for equipment.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1029

EASTMAN KODAK COMPANY, PETITIONER

v.

IMAGE TECHNICAL SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Eastman Kodak Co. ("Kodak") manufactures and sells copiers and micrographic equipment. It has approximately 23% of the market for high volume photocopy machines and less than 20% of the micrographic machine market. Pet. App. 8A n.3. Kodak also sells service and replacement parts for these machines. Respondents are independent service organizations ("ISOs"). In the early 1980s, ISOs began buying parts from Kodak and competing with Kodak in servicing Kodak machines, sometimes offering significantly lower prices.

In 1985 and 1986, Kodak implemented a new policy of selling replacement parts for new micrographic machines only to buyers of Kodak machines who did not purchase repair services from ISOs (that is, to buyers who either repaired their own machines or used Kodak service). The ISOs alleged that Kodak also restricted sales to them of parts for older micrographic machines in various ways.

Kodak also has a policy of not selling copier parts to ISOs and claims that it has never knowingly done so. The ISOs claim, however, that in the past some ISOs purchased directly from Kodak (Br. in Opp. 3 n.3).

Kodak contends that these policies are intended to protect its relationship with its machine customers and its reputation for quality, so as to allow it (i) better to compete in the markets for machines, (ii) to reduce its parts inventories and inventory costs, and (iii) to prevent the ISOs from freeriding on Kodak's investments in the machine industries. Pet. App. 13A; Pet. 5. A direct and intended effect of the policy, however, was to make it more difficult for ISOs to sell service for Kodak machines.

2. In 1987, a number of ISOs brought this action, alleging that Kodak had unlawfully tied the sale of Kodak parts to the sale of service for Kodak machines, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and had unlawfully monopolized and attempted to monopolize the sale of service for Kodak machines, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.[1]

After allowing abbreviated discovery, the district court granted summary judgment for Kodak. As to the Section 1 claim, the court found no evidence of a tying arrangement, because Kodak did not require equipment buyers to buy its parts or service, require parts buyers to buy its service, or require service buyers to buy its parts. Pet. App. 32B-33B. As to the ISOs' Section 2

[1] Additional related claims were not considered by the court of appeals.

claim, the court found no evidence that Kodak had attempted by leverage of its power in the market for servicing Kodak equipment (assuming without deciding that there was such a market and that Kodak had power in it) to gain a competitive advantage in another market. And, the court explained, although Kodak had a "natural monopoly over the market for parts it sells under its name" (Pet. App. 35B), a unilateral refusal to sell those parts to ISOs did not violate Section 2.

3. A divided panel of the Ninth Circuit reversed.

a. The court concluded that a tying agreement existed because Kodak had conditioned the sale of its parts on the buyer's agreement not to buy service from the ISOs. Pet. App. 5A-6A, citing *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5-6 (1958).[2] Such a tying arrangement could be per se unlawful[3] only if Kodak had "sufficient economic power in the tying product market [parts] to restrain competition appreciably in the tied product market [service]." Pet. App. 4A.

It was not disputed that Kodak lacks market power in the markets for its equipment; nor was it disputed that potential equipment buyers "consider the cost of parts and service when initially deciding between Kodak's equipment and its competitors' equipment." Pet. App. 8A. Kodak argued that it therefore could not have market power in any market for parts for its equipment, since an attempt to charge supracompetitive prices for parts would cause potential equipment purchasers to purchase competitors' equipment rather than Kodak's equip-

[2] There could be an unlawful tie between parts and service only if the two were distinct markets. The panel held that whether parts and service were one market or two presented a disputed issue of fact. Pet. App. 6A.

[3] A tying arrangement could be unlawful under the rule of reason even though not per se unlawful, but the ISOs had not relied on the rule of reason in opposing summary judgment in district court, and the court of appeals therefore declined to consider whether Kodak's conduct was unlawful under the rule of reason. Pet. App. 4A n.1.

ment, thus making the price increase unprofitable. The court saw some merit in Kodak's argument, but it nevertheless refused to affirm summary judgment "on this theoretical basis." *Id.* at 10A. It explained that "[n]ot only do we lack the benefit of the district court's consideration of the market power issue, we are presented with a record that was not fully developed through discovery on this issue. Furthermore, market imperfections can keep economic theories about how consumers will act from mirroring reality." *Ibid.* (footnote omitted).

In the court's view, a jury might conclude that Kodak had sufficient power in the parts market from evidence that it charged more than the ISOs for service that was of lower quality, evidence that competition from the ISOs drove down Kodak's service prices, and evidence that some customers paid higher prices for Kodak's service rather than switch to other brands of equipment. Pet. App. 10A-11A. Moreover, "[s]ome strength in the interbrand [equipment] market, although short of actual market power, can combine with other factors to yield power in an aftermarket." *Id.* at 12A. Without discussing what market imperfections or other factors might result in market power in this particular case, the court held that the evidence was "sufficient to raise a material issue of fact as to whether Kodak has power in the parts market." *Ibid.*[4]

In dissent, Judge Wallace argued that a lack of power in the equipment market necessarily precluded a finding of market power in the parts markets (Pet. App. 23A), particularly given the majority's failure to describe what

[4] Because a tying agreement otherwise unlawful may be saved by legitimate business reasons if no less restrictive alternative is available, the court considered Kodak's claimed reasons for its policy. It concluded that the trier of fact might find the product quality and inventory reasons to be pretextual and that there was a less restrictive alternative for achieving Kodak's quality-related goals. It held that Kodak's desire not to permit ISOs to benefit from Kodak's investments in the equipment markets could not, as a matter of law, justify the policy. Pet. App. 13A-14A.

market imperfections might exist to invalidate that conclusion and the lack of any evidence that such market imperfections in fact exist (*id.* at 22A n.1). In these circumstances, evidence of supracompetitive pricing in the parts markets could do no more than show that Kodak was engaging in self-destructive pricing with no long term effect on competition. *Id.* at 23A.

b. As to Section 2, the majority found sufficient evidence to support a finding that Kodak's implementation of its parts policy was anticompetitive and exclusionary and involved a specific intent to monopolize. Pet. App. 17A. It refused to hold as a matter of law that the service of Kodak equipment was not the relevant market. *Id.* at 19A. While recognizing the "logical appeal in Kodak's theory that it could not have monopoly power (let alone market power) in the service market since it lacks economic power in the interbrand markets" (*ibid.*), the court found sufficient evidence of monopoly power to withstand summary judgment. The majority also held that the ISOs had come forward with sufficient evidence, for purposes of summary judgment, to satisfy their burden of proving the lack of legitimate business justification. *Id.* at 18A; see also *id.* at 17A n.9.

Judge Wallace dissented as to Section 2 as well. Entirely apart from market power considerations, he concluded that Kodak was entitled to summary judgment because the evidence of legitimate business justification for Kodak's actions was extensive and undisputed. Pet. App. 25A. In his view, any business justification for Kodak's conduct was sufficient to preclude Section 2 liability even if Kodak also had monopolistic motivations. Pet. App. 25A.

DISCUSSION

This case presents issues that have occasioned much controversy in the lower courts and that warrant resolution by this Court. These issues are whether a manufacturer that lacks market power over equipment may nonetheless be deemed to have sufficient market power

with respect to replacement parts for its own equipment (i) to support liability under Section 2 of the Sherman Act for monopolization or attempted monopolization if it refuses to allow independent service providers access to those parts, and (ii) to support per se liability under Section 1 of the Sherman Act if it ties parts to service. The court of appeals' holding that the ISOs presented sufficient evidence to withstand summary judgment with respect to their monopolization and attempted monopolization claims in this case cannot be reconciled with sound economic analysis or established law. Furthermore, the court's holding that Kodak was not entitled to summary judgment on the tying claim under Section 1 of the Sherman Act seriously distorts the rationale of *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984).

We recognize that this case comes to the Court in an interlocutory posture, but we do not believe that that factor should dissuade the Court from stepping in now. As the Court recognized in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), summary judgment has an important role to play in antitrust cases. This case presents an appropriate occasion for the Court to clarify the law in an area of particular significance to important technology-oriented sectors of the economy, while affirming the importance of summary judgment as a means of ensuring that the threat of burdensome antitrust litigation will not deter efficient business conduct.

1. To establish liability under Section 1 or Section 2 of the Sherman Act in this case, the ISOs must prove that Kodak had market power in the market [5] for parts

[5] For purposes of its summary judgment motion, petitioner did not contest, factually or legally, the issue of market definition. Similarly, for purposes of this brief we assume, without expressing a view on the issue, that parts for the machines of a single manufacturer may constitute a relevant market. But see, *e.g.*, *International Logistics Group, Ltd.* v. *Chrysler Corp.*, 884 F.2d 904, 908 (6th Cir. 1989), cert. denied, 110 S. Ct. 1783 (1990); *General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 975 (9th Cir. 1983); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 278-286 (5th Cir. 1978) (service), cert. denied, 440 U.S. 939 (1979).

for Kodak equipment.[6] As the court of appeals recognized, monopolization requires "monopoly power in the relevant market" (Pet. App. 15A, citing *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966)). Monopoly power is the power to control price and exclude competition. *Id.* at 571. The offense of attempted monopolization requires a "dangerous probability of success" in monopolizing, which in turn depends on the existence of significant market power. See, *e.g.*, *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 827 (6th Cir. 1982) (test is whether defendant "possessed sufficient market power to achieve its aims"). Similarly, as the court of appeals acknowledged (Pet. App. 7a), a tying arrangement is not per se unlawful absent market power over the tying product. *Hyde*, 466 U.S. at 12-18. "As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market." *Id.* at 27 n.46.[7]

[6] The court of appeals apparently treated the market within which Kodak must be shown to have power in the Section 2 context to be the market for service of Kodak equipment (Pet. App. 19A), although the ISOs had argued to the court that their claim rested on Kodak's alleged "monopoly power over the tens of thousands of copier and micrographic equipment replacement parts it makes or has made" (ISO C.A. Reply Br. 16). Indeed, the ISOs continue to identify the "key issue" for both their Section 1 and their Section 2 claims as "whether Kodak enjoys sufficient economic power in the parts market." Br. in Opp. 21 (emphasis added). As we understand the Section 2 claims, we believe they do require a showing of monopoly power over parts. But we also believe that differentiating between parts and service markets is immaterial here, because the same analysis applies to power in either.

[7] Monopoly power differs from mere market power only in degree. See, *e.g.*, *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co.*, 885 F.2d 683, 695-696 & n.22 (10th Cir. 1989), cert. denied, 111

Because it is not disputed that Kodak lacks market power in the market for equipment (Pet. App. A8 n.3), however, the suggestion that it nonetheless could exercise market power in a market for replacement parts or service for Kodak equipment is inherently implausible. An increase in the price of the parts and service needed over the life of the equipment is, in economic substance, an increase in the price of the equipment itself. Thus, as the court of appeals acknowledged, presumably "equipment purchasers would turn to one of Kodak's competitors if Kodak tied supercompetitively priced parts or service directly to equipment." *Id.* at 9A. Similarly, as the court of appeals also recognized (*ibid.*), "equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts." See also *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792, 796-798 (1st Cir. 1988); *General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 974-975, 977 (9th Cir. 1983). This reasoning is consistent with this Court's recognition in other contexts that "interbrand competition is the primary concern of the antitrust laws" (*Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988)), because "so long as interbrand competition existed, that would provide a 'significant check' on any attempt to exploit intrabrand market power." *Id.* at 725 (quoting *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977)).

a. The court of appeals conceded that it had "trouble with the monopoly power (or dangerous probability of monopoly power) issue" (Pet. App. 18A) raised by the ISOs' Section 2 claims. It nevertheless concluded that the ISOs had presented sufficient evidence of such power to avoid summary judgment on these claims (*id.* at 19A), suggesting that "market imperfections," although not "pin-pointed" by the ISOs, could "keep economic theories

S. Ct. 441 (1990); *Dimmitt Agri Industries, Inc.* v. *CPC International Inc.*, 679 F.2d 516, 529 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983).

about how consumers will act from mirroring reality." *Id.* at 10A. Despite the ISOs' failure to point to any specific imperfection that might exist in the equipment market, the court concluded that "[i]t is enough that [the ISOs] have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market."[8] *Ibid.* In particular, the court referred to "evidence that Kodak charges up to twice as much as [the ISOs] for service that is of lower quality than [the ISOs'] service[,] * * * evidence that in some instances competition from ISOs drove down the price that Kodak was willing to charge for service and that in other instances some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems." *Id.* at 10A-11A.[9]

This evidence is insufficient by itself[10] to create a genuine issue of material fact as to whether Kodak has, or

[8] We are unable to reconcile the court's reliance on a possible finding that Kodak has power in the interbrand market with the court's acknowledgement that the ISOs "do not dispute Kodak's assertion that its lacks market power in the interbrand markets." Pet. App. 8A n.3. The court apparently did not rely on a distinction between "power" and "market power," because it noted that the ISOs "have not claimed that these factors are sufficient to give Kodak power in its interbrand markets." *Id.* at 12A.

[9] The court cited this evidence in the context of the ISOs' Section 1 claim. It referred to no additional evidence in connection with the Section 2 claim.

[10] The court of appeals considered the evidence already assembled by the ISOs to be sufficient to withstand summary judgment on both the Section 1 and Section 2 claims. See Pet. App. 10A-12A, 19A. The court thus had no cause to consider, and did not specifically determine (see Pet. App. 10A & n.4), whether the ISOs had been given an "adequate time for discovery" (*Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986)) prior to the award of summary judgment by the district court. This Court need not consider in the first in-

has a dangerous probability of achieving, monopoly power in the parts markets, given the constraining effect of competition in the equipment markets on Kodak's ability profitability to charge supracompetitive prices in the parts or service markets. As Judge Wallace explained in dissent, "[a]t best, this would be evidence that Kodak is pursuing a self-destructive pricing strategy which lacks long-term effects upon competition. It is not evidence of true market power," because if Kodak prices supracompetitively in the parts market, in the absence of some imperfection in the equipment market that the ISOs and the court of appeals have failed to identify, "competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will be quickly eclipsed." Pet. App. 23A.

As Judge Wallace concluded, the majority's analysis goes astray in focusing exclusively on customers who have already purchased Kodak equipment and who may be "locked in" to Kodak parts until they are ready to replace that equipment. By ignoring the effect of Kodak's conduct in the parts market on its sale of equipment—sales on which its future sales of parts and service depend—the majority ignores economic reality. Purchasers have an obvious economic incentive to foresee, and protect themselves from, exploitation by the manufacturer. As

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stance the complaints now voiced by respondents (Br. in Opp. 11-13) as to limitations imposed on discovery. Rather, the question whether discovery was appropriately curtailed should be addressed on remand by the court of appeals in light of this Court's determination of the applicable substantive rules to be applied to respondents' Sherman Act claims.

In any event, we have doubts whether respondents' claims in this respect are well founded. As we shall presently show, this Court's teachings make clear that the requisite market power cannot be demonstrated by showing that a handful of disgruntled customers objected to the practice. That legally inadequate showing appears to have been much of what respondents contemplated as set forth in their Rule 56(f) affidavit and their request to take the depositions of two customers.

the court noted, the ISOs "do not dispute that equipment purchasers consider the cost of parts and service when initially deciding between Kodak's equipment and its competitors' equipment." Pet. App. 8A.[11] Moreover, sellers face the obvious economic risk of losing future equipment sales if they exploit their "locked-in" customers.

Evidence that service provided by an equipment manufacturer is more expensive or of lesser quality than ISO service thus would not rebut the conclusion that the manufacturer cannot exercise market power over replacement parts for its own equipment if it lacks market power in the equipment market itself. Such evidence would, for example, be entirely consistent with a marketing strategy of spreading the cost of equipment more evenly over its life by charging a lower initial purchase price and higher service fees. Here, whatever its particular strategy, the fact remains that Kodak cannot set service or parts prices without regard to the impact on the market for equipment, in which it concededly lacks market power.

In sum, it is inherently implausible that an equipment manufacturer that lacks market power in interbrand equipment markets, could exercise monopoly power in aftermarkets for parts or service for its own brand of equipment.[12] As Judge Wallace correctly observed, the court of appeals erred in holding that the ISOs had pre-

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[11] Relying on a law review article rather than record evidence, the ISOs suggest that purchasers might have difficulty discovering any restrictions in the aftermarkets or in estimating perfectly the cost of parts and service over the life of the equipment. Br. in Opp. 14-15. Whatever relevance these supposed market imperfections might have in a case where they were supported by evidence, there is no reason to think equipment buyers were taken by surprise here, for Kodak's policies are spelled out in its sales contracts (*id.* at 3).

[12] This is so even if all, rather than just "many," Kodak parts "are unique and available only from Kodak" (Pet. App. 11A), since the implausibility of the exercise of power in the parts market depends on competition in the interbrand equipment markets, not on multiple sources of replacement parts.

sented sufficient evidence to create a genuine issue of material fact on this issue in this case.

b. The result should be no different if the ISOs' claims are analyzed as a tying agreement under Section 1 of the Sherman Act. Relying on this Court's decision in *Hyde*, the court of appeals held that Kodak had sufficient market power for a per se unlawful tie if it "is able to force or to induce some potential tying-product customers (here potential Kodak parts customers) to purchase the tied product (here Kodak service) that these customers would not purchase absent the tying arrangement." Pet. App. 7A. Finding evidence that some customers were so forced or induced, because they were "locked in" to Kodak equipment by the cost of switching to a different brand of equipment (*id.* at 7A-8A, 10A-11A),[13] the court found sufficient evidence to defeat summary judgment. This analysis, however, reads the substance out of the market power requirement of *Hyde*.

In *Hyde*, this Court held that East Jefferson Hospital's policy of requiring surgical patients to use the services of anesthesiologists with whom the hospital had an exclusive contractual arrangement was not a per se unlawful tie. In reaching this conclusion, the Court proceeded from a well-established premise: "not every refusal to sell two products separately can be said to restrain competition." 466 U.S. at 11. Indeed, "[b]uyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively —conduct that is entirely consistent with the Sherman Act." *Id.* at 12. For this reason, "tying may have pro-

[13] That many Kodak parts may be "unique and available only from Kodak," Pet. App. 7A, adds nothing to the "lock in" analysis. Customers need Kodak parts only because they need to repair Kodak equipment. If switching from Kodak equipment to other equipment were costless, the availability of Kodak parts would obviously matter not at all. Thus, the cost of switching alone, not limited availability of parts, results in the phenomenon noted by the court of appeals.

competitive justifications that make it inappropriate to condemn without considerable market analysis." *National Collegiate Athletic Association* v. *Board of Regents*, 468 U.S. 85, 104 n.26 (1984).

Because the propriety of adopting a per se approach to particular conduct turns on "the probability of anticompetitive consequences," per se condemnation of a tie-in is appropriate only where "anticompetitive forcing is likely." *Hyde*, 466 U.S. at 16. Such economic coercion is not likely, however, unless a "seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market." *Id.* at 13-14. Thus, anticompetitive "forcing," as described in *Hyde*, does not exist simply because some purchasers of a tied sale would prefer to purchase the tying product separately. *Id.* at 25. Rather, only if consumers are "forced * * * *as a result of the [seller's] market power* would the arrangement have anticompetitive consequences." *Ibid.* (emphasis added).

Hyde establishes that "the 'market power' hurdle" to per se liability for tying is at least "moderately high," so that "it cannot ordinarily be surmounted simply by pointing to the fact of the tie itself or to a handful of objecting customers." *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d at 796.[14] Thus, the hospital's 30% market share in *Hyde*—larger than Kodak's share of the equipment markets here—did not demonstrate a "dominant market position" and provided an insufficient basis for inferring the requisite market power. 466 U.S. at 27. Moreover, *Hyde* makes clear that tying arrangements are but an alternative use of market

[14] As the Court said in *Hyde*, "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." 466 U.S. at 16.

power that could otherwise be used to "enhanc[e] the price of the tying product." *Id.* at 14.[15]

The court of appeals thus erred in holding that sufficient market power for a per se tying violation could be shown merely by an effect on "some potential tying-product customers." Pet. App. 7A. The court compounded its error by relying solely on "locked in" customers who had already purchased Kodak's equipment, for, as we have noted, a focus on those who have already purchased Kodak equipment ignores the constraint on the manufacturer's exercise of market power in parts markets that results from interbrand competition in the equipment markets.[16] The court of appeals has held, in substance, that a reasonable jury could find a tie to be per se unlawful without evidence of effective market power.

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[15] The Court has said that per se unlawful tying does not depend on monopoly power (*United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977)), but at the same time it made clear that market power over price is required. *Id.* at 620 n.13. Per se unlawful tying, then, appears to require market power akin to monopoly power and quite close to monopoly power in degree. See *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d at 796-797 (power to raise prices only with respect to buyers with unusual or special need for a seller's product is insufficient to pass the *Hyde* market power screen; virtually every seller of a branded product has that much market power, and to condemn ties based on that power alone would condemn harmless, and even useful, ties).

[16] In *Hyde* itself, the Court assessed market power with reference to the time patients selected East Jefferson hospital, not the subsequent time when, having chosen East Jefferson, they were being wheeled into the operating room. 466 U.S. at 26-28. In *Digidyne Corp.* v. *Data General Corp.*, 734 F.2d 1336, 1342 (1984), cert. denied, 473 U.S. 908 (1985), the Ninth Circuit found that a "lock in" effect enhanced the defendant's market power, a less extreme position than the court of appeals took here. Nevertheless, two Justices of this Court would have granted certiorari to review, inter alia, "whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase." 473 U.S. at 909 (White, Blackmun, J.J., dissenting from denial of certiorari).

The court of appeals' rationale sweeps too broadly. It risks outlawing conduct that may represent nothing more than an equipment manufacturer's efforts to compete against other manufacturers by devising an equipment/parts/service package that it hopes will appeal to buyers. At least where the manufacturer lacks effective market power in the equipment markets, the tie of parts to service should not be held to so plainly "lack * * * any redeeming virtue" that it is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958).[17]

2. Despite the interlocutory posture of this case, review by this Court is appropriate for at least two fundamental reasons. First, the market power questions this case raises are important and recurring (see Pet. App. 42E-43E). Indeed, this is not the first time this Court has been asked to address this question. See *Data General Corp.* v. *Digidyne Corp.*, 473 U.S. 908 (1985) (White, J., and Blackmun, J., dissenting from denial of certiorari). The marketing practices at issue here appear particularly widespread in high technology industries, notably including the computer industry. As in *Data General*, "[t]he reach of the decision in this case is potentially enormous." *Id.* at 909. The decision of the

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[17] The court below held that the ISOs had raised a genuine issue of material fact as to whether Kodak's quality control justification for its conduct was "pretextual" (Pet. App. 19A), while the dissenting judge found the evidence supporting this justification to be "undisputed" (*id.* at 25A). Although we have doubts about the correctness of the court's holding, we do not believe the question warrants this Court's review. There appears to be no dispute over the proper legal standard for evaluating business justification defenses (*id.* at 18A n.10), so the question raised is a purely factual one. Moreover, proper resolution of the market power issues in this case would make resolution of the business justification issues unnecessary. If Kodak lacks significant market power over parts, it needs no business justification for its conduct.

court of appeals appears to depart from this Court's teachings with respect to market power analysis in tying cases, and it similarly appears to depart from sound analysis of monopolization law. The court's error is indicative of a more widespread uncertainty concerning the degree of market power required for per se illegality in tying cases and the proper treatment of the "lock in" effect. Guidance from this Court would be of substantial benefit both to the courts and to businesses attempting to structure their operations efficiently within the limits imposed by law.

Second, this case presents an appropriate occasion to emphasize the critical role of summary judgment in antitrust litigation. Indeed, summary judgment may be uniquely important in antitrust cases. "Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also * * * the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979); see also II P. Areeda and D. Turner, *Antitrust Law* 57-58 (1978). It is a hard, litigation-provoking fact that procompetitive and anticompetitive behavior may have similar objectives and similar consequences for competing firms; indeed, those legally polar extremes in market behavior may actually appear "indistinguishable" when "judged from a distance" (*Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 762 (1984)). The baleful consequence is that too easy resort to the antitrust laws by "losers" in the market place carries with it the daunting prospect of protracted litigation that may well deter procompetitive conduct (*id.* at 763-764). That is precisely the danger that requires rejection of the unsound "theory" of antitrust liability urged here by the respondents and adopted by the court of appeals.

Properly applied, the requirement that the opponent of summary judgment "set forth specific facts showing that there is a genuine issue for trial" (*Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)) reduces the risk that antitrust litigation will deter procompetitive conduct. Not only do the elements of the offense inform the decision as to whether facts are material, but "antitrust law limits the range of permissible inferences from ambiguous evidence." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. at 588. The evidence in this case, viewed in the light most favorable to the ISOs, is at best ambiguous, for the facts to which the ISOs point would likely be found regardless of whether Kodak had sufficient market power over parts to create a per se unlawful tie. The Court's *Matsushita* admonitions would ring hollow indeed if appellate courts are permitted to rely on speculation that as yet undiscovered and unidentified facts might point less ambiguously to prohibited behavior as a basis for reversing summary judgments granted by district courts.

On the evidence presented to the court of appeals, summary judgment for Kodak was proper. See note 10, *supra*. Nor should the issues of fact identified by the court of appeals as remaining for trial affect the outcome of the case.[18] Accordingly, no purpose would be served by awaiting a trial. To the contrary, it is important that prospective antitrust defendants be spared the costly burdens of trial when all that is complained of is proper competitive behavior. The case is, therefore, appropriate for review at this time.

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[18] If the court of appeals' opinion were read to hold that a trier of fact could conclude, on the basis of the evidence offered by respondent, that Kodak has power in the *interbrand* market (see Pet. App. 12A), then there would be a potentially determinative factual issue for trial. But the court's words, read in the context of the opinion as a whole, cannot fairly be so interpreted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1990

EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF DIGITAL EQUIPMENT CORPORATION, HEWLETT-PACKARD COMPANY, PRIME COMPUTER, INC., UNISYS CORPORATION, AND WANG LABORATORIES INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Amici are all members of the computer industry. Intense competition in this industry—now greatly pressed from abroad—has produced wave after wave of innovation that has changed the face of the world. Calculations that once took weeks (if they could be done at all) now take minutes. Today, a worker sitting at a desk can guide rockets through space, activate the nation's defenses, access vast libraries

of information or operate an industrial assembly line—all by computer. Computers have made typewriters, slide rules, linotype machines and the like obsolete. And tomorrow the computer will let Americans order groceries and transact their banking and other business through their home television sets.

Interbrand systems competition has fostered these advances in technology. The decision below puts such interbrand competition in jeopardy. In the computer business, the highest-performance, lowest-cost combinations of hardware, software and service are required to meet the demands of sophisticated buyers adept at comparing the overall quality and price of each element of systems performance, including post-sale service. Amici have neither the ability nor the incentive to take advantage of system users by lowering the quality or raising the price of such service. Any firm attempting to do so would quickly lose system sales and place its entire systems business at risk. Computer users have greatly benefited from the explosive rate of technological change and the resulting great decline in the cost of computing power fostered by intense systems competition.

These realities of the computer and similar industries are at the heart of numerous precedents rejecting attempts by antitrust plaintiffs to label one or another firm in these industries as a "monopolist" in or as having "market power" over a "market" limited to one isolated part of that firm's overall systems or equipment business. Under these precedents, a firm's lack of market or monopoly power in the interbrand market for computer sales precludes the service of its brand of computers from being a relevant antitrust market because of the inextricable relationship between such service and interbrand systems competition. Numerous other precedents give computer manufacturers the flexibility to make business decisions to enhance their interbrand competitiveness even though such decisions may injure intrabrand rivals.

A majority of the court of appeals panel below misapplied these controlling precedents. The result, if allowed to stand, could permit a jury to find that petitioner Eastman Kodak Company ("Kodak")—or any other integrated firm—possesses market or even monopoly power over servicing its own brand of equipment even while plainly lacking such power in the interbrand equipment market. Such a result makes no economic or antitrust sense. The majority's misapplication of market definition and market and monopoly power principles may well materially impair competition by restraining the freedom of equipment and systems manufacturers to innovate with regard to service and other product development efforts so as to enhance their overall competitiveness. Similarly, the erroneous finding below of a triable issue regarding Kodak's conduct extends a manufacturer's duty to deal with intrabrand rivals to unprecedented limits, and could thereby chill manufacturers from engaging in vigorous interbrand competition.

In short, the effect of the decision below will be to discourage innovation and thereby to freeze the status quo. To maintain competition in the computer industry, we urge the Court to review and reverse the decision below.[1]

ARGUMENT

The decision below is contrary to law and misguided. It conflicts with this Court's decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), and with the decisions of several other courts of appeals. The majority below employed market definition and market and monopoly power principles that defy antitrust and economic sense.

This case presents an ideal and necessary opportunity for the Court to clarify the market definition and monopoly

[1] This brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

power requirements of Section 2 of the Sherman Act, 15 U.S.C. § 2, which it has not addressed in 25 years. During that time, "no aspect of antitrust enforcement has been handled nearly as badly as market definition. This failure has resulted in part because of persistent and unreconciled conflicts of approach in important judicial opinions." R. Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805, 1807 (1990) (footnote omitted). This case also provides an opportunity to clarify the market power requirement of the tying offense under Section 1 of the Sherman Act, 15 U.S.C. § 1, which the Ninth Circuit has misapplied on more than one occasion.[2]

As Justices White and Blackmun recognized in *Digidyne*,[3] which raised issues similar to those involved here, the logic of the decision below has potentially enormous consequences for the ability of integrated firms—most of which compete in highly competitive international markets—to provide the lowest-price, highest-quality systems or equipment to consumers. More specifically, the decision below will have a tremendous impact on the way these firms structure their equipment and service offerings. Numerous pending cases involve the same or substantially similar market definition and market or monopoly power issues as those involved here, and the results have been confusing and inconsistent. *See* Pet. App. at 42E-43E. This Court's prompt intervention is required to provide uniform jurisprudence in this important area of the law and to

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[2] *See also Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). Since many of the high technology companies that may be affected by the decision below are subject to suit in the Ninth Circuit, the decision below threatens a particularly deleterious effect on competition in this vital sector of the U.S. economy.

[3] *Data General Corp. v. Digidyne Corp.*, 473 U.S. 908 (1985) (White and Blackmun, J.J., dissenting from denial of the petition for a writ of certiorari). *See infra* at 10.

eliminate the possibility of further confusion or inconsistency.

The decision below improperly inhibits interbrand systems manufacturers from engaging in procompetitive conduct. The majority held that there was a triable issue regarding the "intent" underlying Kodak's refusal to sell parts to its intrabrand competitors, even though the record forecloses any claim that those competitors need Kodak's parts in order to compete.[4] This holding extends to unprecedented limits a monopolist's duty to deal (assuming *arguendo* Kodak's monopoly power). Worse, it chills systems manufacturers' actions to enhance interbrand competition—where the real clash of market forces occurs—simply because such actions may not be to the liking of intrabrand rivals.

1. *Tying Issues.* As stated by the majority below (Pet. App. at 2A), this case involves antitrust claims by independent service organizations ("ISOs") servicing Kodak copier and micrographic equipment attacking Kodak's business policies (a) not to sell replacement parts to Kodak equipment owners that use ISOs for service; and (b) not knowingly to sell replacement parts to ISOs. The first claim alleges an unlawful tying arrangement under Section 1 of the Sherman Act, and the second claim alleges an unlawful refusal to deal under Section 2 of the Sherman Act.

a. On the tying claim, respondents did not dispute that Kodak lacks market power in the interbrand markets for copier and micrographic equipment, and the majority below recognized the "logical appeal" in Kodak's argument that it could not have market or monopoly power in the

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[4] A similar question of what conduct a firm alleged to have monopoly power may properly engage in is currently before the Court in *Consolidated Rail Corp. v. Delaware & H. Ry.*, No. 90-380 (cert. filed Sept. 4, 1990), in which the Court has requested the views of the United States.

alleged after-markets for replacement parts and service if it lacks such power in the interbrand markets. Pet. App. at 8A n.3, 19A.[5] Nevertheless, the majority held that there was a triable issue whether Kodak had market power over the alleged "tying product"—Kodak replacement parts—because, in its view, "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id.* at 10A. Remarkably, it added that, while respondents had "not conducted a market analysis and pin-pointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality." *Id.*

This formulation creates a "theory of reality" that would eliminate summary judgment in a large class of cases. Under the decision below, no tying (or Section 2 monopolization) case could be disposed of until inquiry into hypothetical market imperfections—whose breadth would be limited only by the imagination of the parties' economists—had been made. This result would lead to extremes of economic speculation never intended by the authors of the Sherman Act.

The decision below conflicts irreconcilably with *Jefferson Parish*, which prohibits tying arrangements only when the seller has market power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish*, 466 U.S. at 13-14. The Court there held that defendants' 30% share of the tying product market for hospital services, even combined with evidence of actual market imperfections, was *insufficient as a matter of law* to support a finding of market power: while those market imperfections may have "generate[d] 'market power' in some abstract sense, they d[id] not generate the kind of market power that justifies condemnation of tying." *Id.* at 26-27 (footnote omitted). The majority below failed to abide by *Jefferson Parish* in holding that a 23% market share plus unidentified, theoretical market imperfections could create otherwise nonexistent market power. Review is necessary to correct this plainly erroneous decision, which would elevate innocuous conduct into an antitrust violation.

[5] Specifically, the majority correctly observed that "competition in the interbrand markets might prevent Kodak from possessing power in the parts market" and that

> just as equipment purchasers would turn to one of Kodak's competitors if Kodak tied supercompetitively priced parts or service directly to equipment, equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts. Kodak's desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service.

Pet. App. at 8A, 9A.

b. The majority's holding that Kodak's undisputed lack of market power in the interbrand copier and micrographic equipment markets did not necessarily prevent Kodak from having market power in the alleged after-markets for parts and service (Pet. App. at 10A-12A) is insupportable.[6] If, as is undisputed, Kodak lacks interbrand market power, *a fortiori* it cannot possess such power in any alleged after-market for its parts or service. Any attempt to raise prices above competitive levels in those alleged after-markets would constitute commercial suicide, because the resulting price increase would cost Kodak far more in lost copier and micrographic equipment sales than it could hope to gain in increased parts or service revenues.[7] Thus, as Judge Wallace explained in his dissent below, Pet. App.

[6] It also conflicts with decisions of the First and Sixth Circuits and with other decisions of the Ninth Circuit. *See* Pet. at 18-20.

[7] The district court thus properly entered summary judgment and did *not* err by denying respondents additional discovery; such discovery could not have yielded evidence sufficient to create a triable issue where respondents did not dispute Kodak's lack of interbrand market power.

at 23A, Kodak's lack of interbrand market power *precludes* any possibility of anticompetitive effect in the hypothetical after-markets for parts or service.

This Court has long recognized that *interbrand*, not intrabrand, competition is the antitrust law's "primary concern." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n. 19 (1977); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724, 726 (1988).[8] By contrast, the decision below in effect subordinates interbrand competition to intrabrand competition. Such a result makes no economic or antitrust sense, and must be reviewed and reversed.

c. The majority attempted to distinguish this case from the Ninth Circuit's controlling decision in *General Business Sys. v. North Am. Philips Corp.*, 699 F.2d 965 (9th Cir. 1983), and other directly relevant appellate decisions by observing that (a) "Kodak charges up to twice as much as [respondents] for service that is of lower quality"; (b) "in some instances competition from ISOs drove down the price that Kodak was willing to charge for service"; and (c) "in other instances some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems." Pet. App. at 10A-11A. Even if such evidence existed (*see* Pet. at 19-20, 21-22), it would fail to raise a triable issue.

Higher prices for Kodak service could be suggestive of market power "under proper circumstances" (*General*

[8] In *GTE Sylvania*, 433 U.S. at 54, the Court held that the rule of reason, not the per se rule, should apply to vertical nonprice restraints because such restraints "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." The Court further noted that "interbrand competition confronting the manufacturer" can provide a "significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *Id.* at 52 n.19.

Business Systems, 699 F.2d at 977), but no such circumstance exists in *this* case.[9] Respondents presented *no* evidence supporting their assertion that Kodak's higher prices resulted from the exercise of market power. Conduct as consistent with lawful as with unlawful competition does not, standing alone, create a triable issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

The possibility that Kodak charged more than ISOs at one point in time does not mean that it has the power to sustain higher prices over a period of time long enough to permit a trier of fact reasonably to conclude that it has market power. *See Syufy*, 903 F.2d at 665-66 ("[i]n evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share" (emphasis by the court)). Indeed, as the majority found, in the short run, "competition from ISOs drove down the price that Kodak was willing to charge for service" (Pet. App. at 11A), thus confirming that Kodak lacks the power to sustain higher prices.[10] Over the long run, interbrand competition even more definitively forecloses Kodak from maintaining higher prices; any attempt to do so would only "hasten[ ] the date on which [Kodak] surrender[s] to its competitors" in the equipment market. *General Business*

[9] One circumstance that is not only proper but *essential* to any inference of market power is a showing of "significant barriers to entry"; absent that circumstance, "any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less." *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990). *Accord United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987 (D.C. Cir. 1990) ("[i]n the absence of significant barriers, a company probably cannot maintain supra-competitive pricing for any length of time"). There is no basis in this record for finding entry barriers allowing Kodak to *maintain* higher prices. Absent such barriers, the mere fact that Kodak might have been charging higher prices at some point in time cannot suffice to create a genuine issue as to its market power.

[10] This evidence, far from distinguishing *General Business Systems*, shows that Kodak lacks market power.

Systems, 699 F.2d at 977. *See also GTE Sylvania*, 433 U.S. at 55 ("[t]he availability and quality of [service and repair] affect a manufacturer's goodwill and the competitiveness of his product").

The possibility that some Kodak equipment owners will pay higher service prices rather than switch to competitors' equipment is just a different way of advancing the so-called "lock-in" notion that a buyer becomes "locked in" to components of or service for the product it buys. The courts have repeatedly rejected this notion as a basis for finding market (or monopoly) power.[11]

The only case even arguably supporting the lock-in theory is *Digidyne*. There, however, the Ninth Circuit did *not* find that an alleged lock-in gave defendant market power; it simply observed that lock-in "enhanced" economic power that the court had already found from the existence of a copyright. 734 F.2d at 1341-43. *Digidyne* has been roundly criticized by other courts of appeals, and the Ninth Circuit itself has declined to apply it. *See* Pet. at 16-17.

This Court's denial of the petition for a writ of certiorari in *Digidyne* was over the dissent of Justices White and Blackmun,[12] and against the recommendation of the United States. In urging the Court to grant the petition in *Digidyne*, the United States explained that the lock-in theory is unacceptable as a matter of sound economics because

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[11] *General Business Systems*, 699 F.2d at 975; *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 293-95 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 917 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 429 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

[12] The dissent in *Digidyne* stated that the question "whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase" raised a substantial issue of antitrust law and policy warranting the Court's review. 473 U.S. at 909.

it improperly focuses only on the customer's post-purchase as opposed to pre-purchase alternatives: "the relevant time frame for measuring the seller's competitive position is when the buyer entered into the contract in preference to some alternative arrangement." Brief for the United States as Amicus Curiae at 15, *Data Gen. Corp. v. Digidyne Corp.*, No. 84-761 (U.S. May 1985). The lock-in theory "ignores how competition in the market operates," "depart[s] from commercial and economic reality" and "skews proper analysis" by erroneously assuming that buyers take no steps to avoid lock-in at the time of purchase and that the seller has no need or desire to attract new customers. *Id.* at 14-17.

This case demonstrates the mischief that *Digidyne* has caused. Review is necessary to put to rest once and for all the misguided notion that a supposed "lock-in" effect gives a seller market power.

2. *Relevant Market Issues.* The decision below as to the relevant product market for the Section 2 refusal to deal claim warrants review.[13] Respondents defined the relevant market as the service of Kodak equipment. *See* Pet. App. at 18A. The majority held that there was a triable issue on that definition *solely* on the ground that the Ninth Circuit had previously "suggested that service of one company's micrographic equipment can be a relevant market under Section 2." *Id.*[14]

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[13] On the Section 2 claim, the majority admitted to "hav[ing] more trouble with the monopoly power . . . issue" because monopoly power "is something more than the market power that is a prerequisite to liability under Section 1." Pet. App. at 18A, 19A. Since respondents failed to present significant probative evidence to overcome summary judgment on their Section 1 claim, they necessarily also failed to present significant probative evidence on their Section 2 claim.

[14] The majority cited *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480-81 n.3 (9th Cir. 1986), *modified*, 810 F.2d 1517 (9th Cir. 1987). But, as Kodak showed (Pet. at 25 n.11), the *Dimidowich* court's dis-

This holding makes no economic or antitrust sense. As this Court stated in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956) (footnote omitted),

> one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trade-marked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.

The Court held that the "competitive market" must take account of the constraints on a firm's ability to raise price or limit output, and specifically must include all reasonably interchangeable substitutes for the products in question and all suppliers that could readily assign productive capacity if given proper incentive to do so. *Id.* at 389-94. *See also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510-11 (1948).

This proposition has become an antitrust axiom. Following *du Pont*, "the lower courts have consistently refused to restrict a relevant market to a company's trademarked product." *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F. Supp. 674, 678 (S.D.N.Y. 1987). *See also Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984) ("as a matter of law, . . . absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market"). Numerous

cussion of Section 1 issues has nothing to do with relevant market definition under Section 2. Its colloquial use of the word "market" was, at most, dictum.

decisions have rejected market definitions limited to a single manufacturer's equipment or to service therefor.[15]

In *General Business Systems*, 699 F.2d at 972, the Ninth Circuit rejected, as a matter of law, a market definition limited to magnetic ledger cards used in defendant's computer systems in light of undisputed evidence of competition in the interbrand systems market. In *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972), the Ninth Circuit affirmed summary judgment against a complaint alleging a relevant market limited to servicing Stenocord equipment because there was no evidence "that Stenocord dominated the market for office dictating machines generally, or that it controlled a major share of the

[15] Many such cases have involved the computer industry. *E.g., A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986); *General Business Systems*, 699 F.2d at 972-75; *Telex*, 510 F.2d at 919; *Allen-Myland, Inc. v. IBM Corp.*, 693 F. Supp. 262, 272-79 (E.D. Pa. 1988); *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp. 965, 985 (N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); *ILC Peripherals*, 458 F. Supp. at 429.

The rule is the same for other industries. *E.g., International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 908 (6th Cir. 1989) ("a manufacturer cannot be charged with antitrust violations if it monopolizes its own brand"), *cert. denied*, 110 S. Ct. 1783 (1990); *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989); *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1538 (8th Cir. 1989); *Key Financial Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 643 (10th Cir. 1987); *Seidenstein v. National Medical Enters.*, 769 F.2d 1100, 1106 (5th Cir. 1985); *Transource Int'l, Inc. v. Trinity Indus., Inc.*, 725 F.2d 274, 282-83 (5th Cir. 1984); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 244 (6th Cir. 1982); *Parsons v. Ford Motor Co.*, 669 F.2d 308, 312 (5th Cir.), *cert. denied*, 459 U.S. 832 (1982); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117-18 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 242 (5th Cir. 1978); *ALW, Inc. v. United Air Lines*, 510 F.2d 52, 56 (9th Cir. 1975); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 296 (7th Cir. 1974).

market for machines of its particular type." And in *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 278-86 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979), the Fifth Circuit held that there was no market limited to servicing Beckman scientific instruments because service was an integral part of the market for equipment sales. *See also United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966) (no submarkets for central station alarm services because, to compete effectively, central station companies had to offer all or nearly all types of alarm services).

These cases preclude finding a market limited to one element (such as servicing) of one manufacturer's products if competition with other manufacturers prevents the exercise of monopoly power over the one element alleged to be the relevant market. In this case, the undisputed fact of interbrand competition precludes definition of a market limited to servicing Kodak equipment.

3. *Conduct Issues.* While purporting to recognize the general rule that a monopolist has no duty to deal with its competitors, the majority below stated that a "monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason" and that "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications." Pet. App. at 16A-17A. It held that (1) there was a triable issue whether Kodak's first two justifications of promoting interbrand competition and reducing inventories (*see* Pet. at 5-6) were "genuine rather than pretextual"; and (2) Kodak's third justification of preventing freeriding by ISOs (*see* Pet. at 6) was illegitimate as a matter of law. Pet. App. at 17A-18A.

The decision below extends to unprecedented limits a monopolist's duty to deal (assuming *arguendo* Kodak's monopoly power). This Court has *never* "required an unregulated monopolist, acting independently, to share its facility with a competitor with which it has had no prior history of dealing." *Florida Fuels, Inc. v. Belcher Oil Co.*, 717 F. Supp. 1528, 1535-36 (S.D. Fla. 1989) (collecting cases). But the decision below imposes just such a requirement and, in effect, forces such a firm to subsidize its competitors unless it can prove its business justification.[16]

To date, this Court has held—at most—that "a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (discussing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)), *cert. denied*, 480 U.S. 934 (1987).[17] The majority never made the *critical* inquiry: whether providing replacement parts to ISOs (or to customers using ISOs) was indispensable to effective competition.

The record in this case precludes any such finding. While Kodak has for several years followed a policy of not providing replacement parts to ISOs or customers using ISOs, the 18 respondents in this case continue in business and, as the majority observed, "presented evidence that their

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[16] The majority purported to recognize that a Section 2 plaintiff bears the burden of proving lack of business justification. Pet. App. at 17A n.9. But it rejected Kodak's proffered justifications on the basis of speculative inferences, not on the basis of significant probative evidence showing that those justifications did not exist or were not legitimate.

[17] In *Aspen*, the Court upheld a jury verdict holding a monopolist liable for, *inter alia*, withdrawing from an interchangeable ski ticket program. In doing so, the Court found it significant that "interchangeable tickets are used in other multimountain areas which apparently are competitive," and on that basis "infer[red] that such tickets satisfy consumer demand in free competitive markets." 472 U.S. at 603. Thus, the defendant's participation in an interchangeable ticket program could be viewed as indispensable to effective competition.

service is superior to Kodak service." Pet. App. at 13A. Plainly, if respondents can provide superior service without access to parts from Kodak, access to such parts is not indispensable to effective competition. Accordingly, Kodak can have no legal duty to deal.

Moreover, the holding below that Kodak's desire to prevent freeriding by ISOs is illegitimate as a matter of law (*see* Pet. App. at 14A-15A) is contrary to this Court's repeated recognition (in a variety of circumstances) that it is perfectly legitimate for businesses to take steps to eliminate freeriding. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-63 (1984); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 222 (1980); *GTE Sylvania*, 433 U.S. at 55. It also conflicts with the Fourth Circuit's recent decision in *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924 (4th Cir. 1990). In *Abcor*, defendant had for many years allowed ISOs to purchase replacement parts on a same-day basis. In 1988, it terminated this service for ISOs, in part to force ISOs to maintain their own parts inventory rather than freeriding on its inventory by deferring parts purchases until the day they were needed. *See id.* at 929. The Fourth Circuit held that defendant's change in parts policy did "not rise to the . . . level of anticompetitive activity" because defendant merely eliminated plaintiff's " 'free ride' by shifting the inventory cost to the plaintiff." *Id.* at 930. *Abcor* thus recognizes that the desire to eliminate freeriding by competitors *is* a legitimate business justification. Review is warranted to resolve this conflict.[18]

More fundamentally, review is necessary to encourage vigorous, procompetitive conduct. Assuming the existence of monopoly power, even monopolists must be given "some leeway in making business decisions." *Byars v. Bluff City*

[18] The decision below also conflicts with *Olympia*, 797 F.2d at 377, in which the Seventh Circuit held that even a monopolist need not give a competitor a "free ride" by subsidizing the competitor's business.

News Co., 609 F.2d 843, 862 (6th Cir. 1979). And "[a] monopolist has the same right to compete as any other company. Under the antitrust laws, a monopolist is encouraged to compete vigorously with its competitors and to remain responsive to the needs and demands of its customers." *United States Football League v. National Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988) (approving jury instructions). The decision below deters brand-name manufacturers from engaging in vigorous competition by exposing them to trials to examine the motives underlying their business decisions, and to the attendant possibility of treble damages liability if a jury does not like those decisions.[19] Review is necessary to prevent this result.

4. ***Consequences of the Decision Below.*** This case has potentially enormous consequences for the way that all firms that are even in part vertically integrated conduct their businesses. Under the decision below, every firm that services and provides replacement parts for its equipment is subject to a finding that it is a "monopolist" in a "market" limited to service of or replacement parts for that equipment, even if there is vigorous interbrand competition. Such a result would affect countless firms in a variety of industries, mostly at the frontiers of the United States' competitive position in hotly contested international markets for equipment and systems sales.

This departure from sound market definition and monopoly power principles, and the majority's holding that there is a triable issue regarding the intent behind Kodak's conduct, both invite groundless antitrust charges whenever an integrated firm modifies its service arrangements to enhance its interbrand competitiveness in a manner not to the liking of intrabrand independent service firms. In-

[19] Two juries have recently returned large verdicts under Sections 1 and 2 against integrated systems manufacturers on similar antitrust theories. *See* Pet. at 13.

dependent service firms that have "adopted" one manufacturer's products as their own service targets will almost always seek shelter in some aspect of the manufacturer's service structure, and then claim an antitrust violation if, in pursuit of systems business, the manufacturer alters its service or parts business in a way that coincidentally upsets their arrangements. The threat that such litigation will survive summary judgment and advance to the point of permitting a jury to find "monopolization" of such a "market" chills precisely the kind of innovation and competition that the antitrust laws are intended to foster. *See Business Electronics*, 485 U.S. at 728 ("[m]anufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties").

This concern is quite real, not merely academic. As discussed in Kodak's petition, numerous cases are currently pending in the computer, medical equipment and printing equipment industries that involve identical market definition and monopoly power issues and that challenge the same or similar business practices or decisions as are involved here. *See* Pet. at 13-14 & Pet. App. at 42E-43E. This Court's intervention at this time is required to provide uniform jurisprudence in this important area of the law, and to keep the law in the lower courts from becoming even more confused than it already is.

CONCLUSION

For the foregoing reasons, Kodak's petition for a writ of certiorari should be granted.

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IN THE
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OCTOBER TERM, 1990

EASTMAN KODAK COMPANY,
Petitioner,
v.
IMAGE TECHNICAL SERVICES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

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---

MOTION OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Computer and Business Equipment Manufacturers Association ("CBEMA") hereby moves, pursuant to Rule 37.2 of the Rules of the Court, for leave to file the attached brief as *amicus curiae* in support of the petition of Eastman Kodak Company ("Kodak") for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Kodak has consented to the filing of the brief; respondents have withheld their consent.

CBEMA is a leading trade association representing 26 major manufacturers of computer and business equipment systems and associated maintenance and repair services, replacement parts, supplies, and training. The misapplication of market power analysis by the court of

appeals below, and its erroneous conclusions regarding Kodak's business conduct, threaten to provoke a surge of new treble damages actions against CBEMA members, challenging many commonplace marketing and distribution practices that enhance competition in this industry and promote product and service quality.

The attached brief brings relevant matter to the attention of the Court that has not already been brought to the Court's attention. Accordingly, the motion to file the attached brief should be granted.

Respectfully submitted,

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---

BRIEF *AMICUS CURIAE* OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Computer and Business Equipment Manufacturers Association ("CBEMA") is a leading trade association representing 26 major manufacturers [1] of computer hardware and software, peripherals, telecommunications equip-

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[1] CBEMA's members include: 3M; AMP Inc.; Amdahl Corp.; Apple Computer, Inc.; AT&T; Bell & Howell; Bull HN Information Systems, Inc.; Compaq Computer Corp.; Dictaphone Corp.; Digital Equipment Corp.; Eastman Kodak Co.; Fujitsu America, Inc.; Hewlett-Packard Co.; Hitachi Computer Products (America), Inc.; Honeywell Keyboard Division; IBM Corp.; ICL, Inc.; Information Handling Services; Multigraphics, A Division of AM International Inc.; NCR Corp.; Panasonic Communications & Systems Co.; Sony Corp. of America; Tandem Computers Inc.; Tektronics, Inc.; Texas Instruments Inc.; and Xerox Corp.

ment, photocopiers, micrographic equipment and other business equipment.[2] Some of CBEMA's members also make other technologically advanced equipment, such as medical equipment used in health care facilities. To enhance their sales of hardware and software, CBEMA members also offer hardware and software maintenance and repair services, replacement parts, supplies, training and other associated services and products.

CBEMA is submitting this brief *amicus curiae* because the Ninth Circuit's approach to market power analysis in this case threatens to provoke a surge of new treble damage actions against CBEMA members, challenging broad classes of commonplace marketing and distribution policies that are designed to enhance competition and promote product and service quality, product innovation, safety, and other ends beneficial to consumers.

If the Ninth Circuit's decision is allowed to stand, manufacturers of computer systems and a whole range of other technologically advanced products in competitive industries may be held to have "market power" in the "markets" for their *own branded products*, components, replacement parts, and associated services, *even if* these manufacturers have *no* market power in the interbrand markets for the systems themselves. As a result of the Ninth Circuit's radical approach, lawsuits will spring up to challenge the continued use of "authorized dealer" criteria to assure quality control and customer satisfaction in the sale of technologically complex products, and plaintiffs will challenge a whole variety of busi-

[2] CBEMA represents a multifaceted high-technology industry that is critical to the U.S. economy. CBEMA members had total revenues of $180 billion in 1989 from information technology and services. The computer and business equipment industry had $26 billion in exports in 1988, fully eight percent of total U.S. exports. CBEMA members employ over 1.2 million workers in the U.S.

ness practices that are designed to strengthen warranty programs and extended service arrangements, protect intellectual property, and promote product safety. Manufacturers will be inhibited from continuing to develop authorized dealer networks if they can be challenged as instruments to "monopolize" the sale of branded products, or if literally anyone can demand the right to purchase a manufacturer's products for resale. And manufacturers cannot be expected to offer extended warranties on complex systems if they cannot require customers to use approved sources of parts and service or impose other restrictions. These and similar product marketing and distribution practices are vital components in individual manufacturers' efforts to win customers' loyalty and compete in interbrand markets.

Inexorably, the rash of litigation spawned by failure to reject this new approach to market power analysis will lead to a detailed program—comprehensive in scope but fragmented in execution—for regulating how systems manufacturers in competitive industries go about distributing and promoting their products. Because this program will be implemented by the courts through private actions alleging "tying" and "monopolization" by manufacturers, backed by the blunt instruments of *per se* liability and treble damage exposure, manufacturers will be deterred from adopting policies that involve even a slight risk of challenge. The resulting *de facto* regulatory regime will be especially rigid and averse to innovation.

Throughout the 1980s, CBEMA has provided the courts,[3] Congress and a number of state legislatures with views

[3] CBEMA was one of a number of organizations sponsoring a brief *amicus curiae* in *Boat & Motor Mart v. Sea Ray Boats, Inc.*, 825 F.2d 1285 (9th Cir. 1987), urging the Court of Appeals to construe California franchise law narrowly to avoid imposing its elaborate restrictions on diverse independent dealer relationships that bear no relationship to franchises.

on a variety of proposals that would have impaired interbrand competition by regulating independent dealer relationships as if they were franchises, and proposals that in other ways would have limited the ability of systems manufacturers to respond appropriately when independent dealers were not performing under their contracts. Most recently, CBEMA provided testimony before the House and Senate Judiciary Committees [4] in the 101st Congress opposing legislation that would have overruled this Court's *Monsanto* and *Sharp* decisions [5] and placed inappropriate burdens on manufacturer-defendants to disprove weakly supported *per se* resale price maintenance claims by dissatisfied dealers and distributors.

Interbrand competition among CBEMA members and other systems manufacturers drives technological innovation, lowers prices and improves service to customers. Court review of the Ninth Circuit's decision is critical to ensure that the antitrust laws are used to enhance, not hinder, valuable interbrand competition in this industry.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding in this case is insupportable. Because it is undisputed that Kodak lacks market power in the interbrand market for photocopiers and micrographic equipment, it cannot have market power in any derivative "market" for component parts, replacement parts, or service for its branded equipment. The Ninth Circuit's decision would make every manufacturer a monopolist, and threatens to impair, not enhance, vital inter-

[4] *Price Fixing Prevention Act of 1989: Hearing on H.R. 1236 Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 255 (1989) (statement of Simon Lazarus on behalf of CBEMA); *To Amend the Sherman Act Regarding Retail Competition: Hearing on S. 865 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 374 (1989).

[5] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

brand competition. The decision would interfere with the ability of systems manufacturers to design, sell and service such systems and meet customer demand, and would create an unmanageable "duty to deal" with unauthorized service suppliers.

Although the facts of this case involve replacement parts for photocopiers and micrographics equipment, the impact of the Ninth Circuit's decision will be much broader. The appellate court's approach to market power analysis will affect competition not only in the photocopier and micrographics equipment markets, but also in the markets for computers and associated equipment and software, business equipment generally, high-technology medical and scientific equipment, and virtually every other complex product sold as part of an integrated system in a competitive interbrand market. Moreover, the impact of the decision will not be limited to parts policies, but will more generally affect the design of distribution and marketing arrangements for those systems, warranties, service agreements, and other business policies and practices, and even the way different hardware and software products are integrated into systems. Manufacturers' decisions in all of these areas are vital parts of their strategies for competing with industry rivals.

The adverse impact of the Ninth Circuit's decision looms particularly large because it virtually eliminates summary judgment in a large class to tying and monopolization cases in which private plaintiffs merely assert without proof that unspecified "market imperfections" may cause market power to exist in circumstances in which the existence of such market power is economically implausible. The court's holding was plainly contrary to this Court's holding in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), that plaintiffs must offer "more persuasive evidence" to survive summary judgment in such situations.

The market for computer and business equipment systems is vibrant, technologically innovative, and intensely

competitive. It is particularly inappropriate in this setting to use *per se* liability rules to invalidate marketing and distribution practices that foster interbrand competition on the grounds that they are illegal "tying" arrangements that limit intrabrand competition. The Court should grant Kodak's petition for writ of certiorari to forestall these aberrant results, bring the Ninth Circuit's decision into line with established precedent and provide needed guidance to numerous lower courts now considering similar cases.[6]

ARGUMENT

The plaintiffs in this case, a number of independent service organizations ("ISOs") that were not part of any Kodak-authorized dealer network, challenged Kodak's policies not to sell replacement parts for Kodak photocopiers and micrographic equipment to ISOs or their customers.

The primary reasons for Kodak's policies were to maintain the highest possible standards for the servicing of its equipment, and to avoid divided responsibility for equipment performance that could lead to "finger pointing" and customer dissatisfaction when unauthorized ISOs could not repair a particular problem. These policies were designed to permit Kodak to win its customers' respect and loyalty, expand its share of the interbrand market, and better compete with such substantial companies as Xerox, Savin, Canon, Ricoh, 3M, Bell & Howell, and Minolta.

Nevertheless, the ISOs, seeking expanded access to the service market, claimed that these policies amounted to unlawful tying and refusals to deal under Sections 1 and 2 of the Sherman Act. U.S. District Court Judge William Schwarzer granted Kodak's motion for summary judgment on these claims, but a divided panel of the Ninth Circuit reversed.

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[6] As noted in the Petition, there are a dozen other pending cases involving identical issues in the computer, medical equipment and printing equipment industries. Pet. App. at 42E-43E.

On appeal, the majority of the court focused on the ISOs' claims that Kodak had tied the sale of service to the sale of its replacement parts, and that it used its replacement parts policies to monopolize the "market" for service of Kodak brand equipment. These claims require a showing that Kodak has market power in the alleged "market" for its replacement parts, and that the service of Kodak brand equipment is indeed a "market" over which Kodak could obtain market power.

On the tying claim, however, the ISOs did not dispute that Kodak lacked market power in the interbrand market for copiers and micrographic equipment, and the Ninth Circuit recognized the "logical appeal" in Kodak's argument that it could not have market power in the market for Kodak replacement parts if it lacked market power in the interbrand market. Pet. App. at 8A n.3, 19A. Nevertheless, the majority held that there was a triable issue whether Kodak has market power over the alleged tying product because *unspecified* "market imperfections" could create market power in this setting.

The majority also reversed Judge Schwarzer's grant of summary judgment on the respondents' Section 2 monopolization claims, holding, based on a similarly speculative line of reasoning, that Kodak could have monopoly power in a distinct market for service of Kodak equipment. The Ninth Circuit thus remanded for a trial on the ISOs' admittedly implausible claims.

I. THERE IS INTENSE COMPETITION IN THE INTERBRAND MARKET FOR COMPUTER AND BUSINESS SYSTEMS.

The interbrand markets for the computer and business systems manufactured and sold by CBEMA members and other domestic and foreign companies are characterized by increasing international competition and by sophisticated and demanding customers who are seeking integrated solutions to specific information processing problems.

There are hundreds of participants in the computer and business equipment markets.[7] The participants in these markets include many of the Nation's largest businesses, such as IBM, AT&T, DEC, Hewlett-Packard, Apple, Kodak and Xerox, as well as major foreign manufacturers such as Hitachi, Fujitsu and Sony. In addition, many smaller companies also compete for this business.

These markets are characterized by extraordinary technological innovation, compressed product-cycles, continued downward pressure on prices, and widely varied and continuously changing patterns of packaging, distributing, and servicing products. Competition from international as well as U.S.-based manufacturers is intense, and new entries into and exits from particular markets are frequent. The rewards for successful product development and distribution strategies can be great, though often temporary, while the penalty for mistakes or slow responses to market trends is severe and, not infrequently, enduring. All these features of contemporary high technology information technology markets make it particularly imperative for manufacturers to enforce strict standards on the manner in which their products are marketed and serviced.

The degree of competition in these markets is perhaps best demonstrated by the trend of falling product prices. The price index for microprocessors, for example, declined by over 22 percent in the 1980s, while the consumer price index increased almost 36 percent during the same period. The price of general purpose digital computers fell 9.2 percent between 1988 and 1989.

Purchasers of high technology computer and business systems tend to be both sophisticated and demanding. Customers seek solutions to specific information processing problems. In selecting systems to meet those specific

[7] For example, over 400 companies are listed under the Standard Industrial Classification for computer manufacturers.

needs, customers consider and compare total system costs, which include both the initial purchase price and the costs of associated products, replacement parts, service, and maintenance.[8] Competition in the interbrand markets for computer and business equipment includes competition on the value and terms of various post-sale services.[9] A company's failure to innovate and compete with regard to these post-sale services will quickly result in loss of business at the interbrand level.[10]

In response to the great diversity in customer preferences and customers' solution-seeking approach, manufacturers offer an enormous number and range of products, and combine products into systems and packages designed to meet customer needs. For instance, monitors, computer processing units, operating system and applications software, disk drives, keyboards and printers are often sold as integrated systems. Warranties are packaged with hardware or software for customers who do not want to worry about post-sale problems. Training, manuals and other user-assistance services are sold with hardware and software to address customer desires for education and information about using their business and computer systems. Manufacturers offer a vast number of different product combinations, driven by customer demand, competitive pressure, and engineering creativity.

[8] For instance, respondents did not dispute that purchasers of Kodak equipment consider the costs of parts and services when deciding between Kodak's products and other manufacturers' products. Pet. App. at 8A.

[9] *See Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (the quality of service and repairs affects the competitiveness of a manufacturer's products).

[10] *E.g., General Business Sys. v. North Am. Philips Corp.*, 699 F.2d 965, 972-73 (9th Cir. 1983) (manufacturer's decision to continue using outdated computer card technology in the face of new computer disk technology resulted in loss of market share in the computer systems market).

II. MAINTAINING SERVICE QUALITY IS CRITICAL TO ENHANCING INTERBRAND COMPETITION.

Because computer and business systems are technologically sophisticated products, quality assurance at every stage of the manufacturing, distribution, sales, and post-sale service process is critical to maintaining customer satisfaction.

Any given problem with computer or business system performance can be caused by problems with the hardware, software, the hardware maintenance program or replacement parts, or software maintenance or updates. Indeed, the customer often cannot identify the source of a given problem—all he or she knows is that the system as a whole is not performing the task that he or she purchased the system to perform.

Any bad experience with a system, regardless of the cause, tends to reflect badly on the reputation of the manufacturer. In particular, if the responsibility for system repair and maintenance is divided among multiple companies, it is difficult or impossible for the customer to know which provider may be responsible for a problem. Customers tend to attribute the blame for any problems to the manufacturer and shift their loyalty to systems supplied by competitors.

To maintain quality standards, and minimize the "finger pointing" problem, information systems providers have experimented with a diverse range of business practices, such as using authorized dealers to provide expert point-of-sale and post-sale services and providing product warranties and extended service agreements. For a manufacturer to assure customer satisfaction, and to compete against its rivals, it must have flexibility to implement these or similar policies in delivering its products and services—and the flexibility to modify its approach as competitive conditions change.

III. THE NINTH CIRCUIT'S DECISION THREATENS PROCOMPETITIVE DISTRIBUTION AND MARKETING PRACTICES.

The unjustified "micro-market" analysis of market power by two judges of the Ninth Circuit jeopardizes the ability of manufacturers to implement a variety of procompetitive quality assurance policies for complex computer, business and other high technology systems. Most obviously, the decision below invites private treble damages suits challenging replacement parts policies comparable to Kodak's. This result will strongly discourage business equipment manufacturers from implementing business practices designed to reduce "finger pointing," assure quality service, and manage inventory costs, even though such practices enhance competition and have no demonstrated adverse effect on consumers.

More generally, the decision below threatens a whole range of similar point-of-sale and post-sale policies designed to maintain the quality and integrity of sophisticated systems. If permitted to stand, the Ninth Circuit's decision would dramatically limit manufacturers' flexibility to determine the best means to deliver hardware and software products, product updates, warranties, parts, maintenance, repair services, and other post-sale services throughout the computer and business equipment markets and in other markets in which quality assurance is critical to customer satisfaction, such as medical and scientific equipment.[11]

Authorized Dealer Networks. Many system manufacturers distribute their products and services through a network of qualified dealers. In order to qualify, a dealer must have the training and technical expertise to advise

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[11] *See, e.g., Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978) (involving parts for centrifuge equipment used for biomedical analysis and vaccine development). *See also Mozart Co. v. Mercedes Benz of N. Am. Inc.*, 833 F.2d 1342 (9th Cir. 1987) (involving parts for luxury automobiles).

customers on how to use and combine the manufacturer's products into a system that will meet the customer's needs. The dealer also must have the skills and facilities to provide warranty and other post-sale service. Authorized dealers are provided with a full line of hardware and software products, parts and updates.

Authorized dealers are an important option for the delivery of products and services, permitting a manufacturer to ensure quality control at the retail level. Knowledgeable advice from the dealer at the point of sale will permit the customer to select the most appropriate system, and thereby promote customer satisfaction with the products. Moreover, providing advice and expertise, sales, training and post-sale maintenance and repair through a single, full-service outlet provides the customer with better and more convenient service. Using authorized dealers is an important means of enhancing the customer reputation of the manufacturer's products.

Under the open-ended "duty to deal" which arises from the Ninth Circuit's analysis, however, a manufacturer might be precluded from limiting product or parts distribution to authorized dealers—anyone could assert the right to become a reseller of the manufacturer's products. In spite of intense competition in the interbrand market, a plaintiff could assert, based on the decision below, that the manufacturer has market power in some brand-specific submarket, such as parts or software. The continued use of authorized dealer networks, which serve consumer interests and promote interbrand competition, would be threatened.

Warranty Programs. Warranties for computer and business systems benefit customers by directly shifting the risk associated with malfunctions or other system problems from the purchaser to the manufacturer. Warranties are an important factor in interbrand competition, as can be seen most clearly in advertising for computers and other high-technology products. Indeed, as a

promotional device, one manufacturer in the industry has guaranteed *replacement* of its equipment at the option of the customer over a three-year period.

In order to limit the manufacturer's exposure under such guarantees or extended warranties, conditions on the maintenance and repair of the warranted product are often included. For instance, warranty coverage is often conditioned on the service being performed by the manufacturer, the use of designated, trained service organizations for any necessary repairs or maintenance, or the use of manufacturer-approved replacement parts.[12] These conditions ensure that the manufacturer is only guaranteeing its own performance—and that it is not responsible for the errors of others.

The Ninth Circuit's market power analysis could severely discourage manufacturers from offering such warranties. Unauthorized service organizations might argue that market power in the "market" for brand-specific extended warranties or service arrangements is the basis for tying and attempted monopolization claims relating to the parts or service markets. With the threat of this type of claim, manufacturers may be forced to offer less comprehensive warranties, or to permit unauthorized service organizations to share responsibility for servicing warranted products, to the detriment of consumers and competition in the interbrand market.

Selling Systems. It is common for computer and business equipment manufacturers to combine complementary components and services into integrated systems for sale to customers who desire them. For instance, software may be sold with a maintenance contract providing for the delivery and installation of software upgrades by authorized service representatives as they are developed.

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[12] *See, e.g., Spectrofuge, supra,* at 262-63 (warranty provides one price for replacement parts for centrifuges if the manufacturer provides service, and a higher price if an ISO provides service).

This maximizes customer satisfaction by ensuring that all users have the best software product operating in their systems. It also facilitates servicing the system, because a repairman visiting the customer's facilities knows that all necessary updates have been installed when her or she is testing the system.

These procompetitive arrangements could be subject to challenge under the Ninth Circuit's decision. In the software upgrade example, unauthorized service organizations could claim that the manufacturer has market power in the "market" for the branded software, and is using that power to tie or attempt to monopolize software maintenance services. Facing the prospect of defending jury trials, manufacturers could be reluctant to use such arrangements, although these arrangements foster ongoing product innovation and improvements which benefit consumers.

Diagnostic Software. Some computer companies have developed specialized, highly sophisticated computer programs designed to isolate problems, or "bugs," in their computer systems. This diagnostic software is developed, at substantial cost, to allow manufacturers to identify and solve customer problems more quickly, efficiently and effectively. In some cases, the software can be installed in the customer's equipment and then accessed by the manufacturer's service personnel from their central service headquarters by modem and telephone link.

Computer system customers consider the cost and quality of maintenance and repair services when they choose from among systems offered in the interbrand market. Diagnostic software, which permits the manufacturer to offer better service, is developed to respond to customer demand and to compete in the interbrand computer system market.

A manufacturer may legitimately impose limitations on how its diagnostic software can be used: (1) to protect its significant investment in the software; (2) to

preserve its copyright; (3) to safeguard trade secrets; (4) to ensure that the software is used properly; and (5) to assure that any bugs that are identified are remedied. For example, in *Service & Training, Inc. v. Data General Corp.*, 737 F. Supp. 334 (D. Md. 1990), the manufacturer allowed installation of the diagnostic software in a customer's computer only if the customer maintained a service agreement with the manufacturer. The agreement specified that the program remained the property of the manufacturer, and would be removed if the service contract were cancelled. The manufacturer also licensed the diagnostic software to large customers that serviced their own equipment, with an agreement strictly limiting the use of the software to the equipment for which it was provided.

The market power analysis endorsed by the Ninth Circuit in this case could be used to argue that the antitrust laws require a manufacturer to provide its diagnostic software to a customer even if the customer chooses to purchase follow-up service from an unauthorized ISQ, and/or require manufacturers to license unauthorized ISOs to use the software themselves. By claiming that the manufacturer has market power in the "market" for diagnostic software for its branded products, unauthorized service organizations could claim both tying between the diagnostic software and service, and attempted monopolization of the service market. Under the Ninth Circuit's analysis, plaintiffs could survive summary judgment with little evidence of market power beyond this speculative assertion. Faced with the prospect of treble damages claims, manufacturers might decide not to develop the software in the first place, or not to permit authorized dealers or large direct customers to use the software or install it in their systems. Such a result would injure both the quality of service available to the customer and the ability of the manufacturer to compete in the interbrand market.

Safety Concerns. For some products, such as medical equipment, parts and service practices are dictated by safety concerns.[13] Inadequate service of some equipment can cause serious injury.[14] A medical equipment manufacturer [15] may adopt business policies—such as selling medical equipment with a service agreement, providing warranties conditioned on use of the manufacturer's replacement parts and service, or providing replacement parts only to certified dealers and service providers—to ensure proper maintenance of its products. These policies clearly promote the patient's health and safety. Correspondingly, careful maintenance is also in the interest of both the health care provider and the manufacturer, minimizing the risk of tort liability relating to the failure of the equipment.

Despite their clear benefit, such practices could be subject to attack under the Ninth Circuit's analysis, subjecting the aftermarket for medical equipment parts and services to massive disruption. This result is contrary to the public interest, chilling practices designed to ensure that medical equipment is maintained in optimal condition.

IV. THE NINTH CIRCUIT'S DECISION THREATENS TO FORCE INTEGRATED FIRMS TO SUBSIDIZE NON-INTEGRATED COMPETITORS.

The necessary effect of the Ninth Circuit's decision will be to impose new duties to deal for manufacturers struggling to compete in interbrand markets. This new-

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[13] *See Continental T.V., supra,* at 55 n.23 (safety concerns are a legitimate reason for vertical restrictions concerning product marketing and service).

[14] *Spectrofuge, supra,* at 258 n.1 (improper servicing of centrifuge equipment used for biomedical analysis and vaccine preparation can result in explosion or contamination by hazardous materials).

[15] Several CBEMA members manufacture medical equipment in addition to computer and business equipment.

found, open-ended duty to deal could be extremely onerous, particularly for the smaller or weaker participants in these markets.

As just one example, some manufacturers of high technology computer or business systems must produce and stock hundreds of thousands of replacement parts at very substantial costs. Typically, to minimize the costs of maintaining these inventories, manufacturers stock only the parts necessary to guarantee service to direct equipment purchasers and authorized dealers. Under the Ninth Circuit's decision, in a regime in which anyone can demand equal access to any number of parts, manufacturers will be forced to maintain larger inventories, at even greater costs. In effect, by incurring these greater costs, manufacturers would be forced to subsidize their downstream service competitors. The antitrust laws have never before been stretched to encompass such a purpose when interbrand markets are competitive.

V. THE DECISION BELOW THREATENS AN ANTICOMPETITIVE EXPANSION OF *PER SE* LIABILITY.

Use of *per se* liability rules to invalidate the business practices discussed above would be particularly inappropriate in this vibrant, competitive industry. *Per se* liability (and treble damages) would flow automatically in a tying case from a finding by a trier of fact—permissible under the Ninth Circuit's holding—that a particular systems manufacturer had the requisite market power in an intrabrand product or service.

Per se liability rules, such as the rule for tying, were created to conserve judicial resources in cases involving restraints that are "plainly anticompetitive" and cannot be justified in competitive terms. *Broadcast Music Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8 (1979). The Court has held that, to be manifestly anticompetitive, agreements or practices must have a "per-

nicious effect on competition and lack . . . any redeeming virtue." *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).

No characterization could be more inapt, in regard to the high technology markets affected by the Ninth Circuit's decision. As discussed above, the market for computer and business equipment systems is intensely competitive, and the restraints at issue in this case promote interbrand competition. This is precisely the kind of circumstance in which the Court has refused to extend the *per se* rule. *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977) ("interbrand competition . . . provides a significant check on the exploitation of intrabrand market power").

As a result, the Court should limit the application of *per se* tying analysis to cases in which there is clear evidence of significant market power in the tying product market, as it did in the *Jefferson Parish* case. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984). The Court should be especially reluctant to apply the *per se* rule where, as in this case, vigorous interbrand competition eliminates the possibility of market power in any "aftermarket."

VI. THE DECISION BELOW MISAPPLIED THIS COURT'S SUMMARY JUDGMENT RULES.

This Court has held that when a plaintiff makes claims that are inconsistent with traditional notions of economic and antitrust analysis, it must present "more persuasive evidence than would otherwise be necessary" to support its theory in order to survive a motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). An antitrust plaintiff is not entitled to a trial on the merits on the basis of an implausible theory supported by ambiguous evidence.

The Ninth Circuit acknowledged that respondents' assertion that Kodak had market power in the market for

Kodak parts was inconsistent with economic theory, because Kodak's desire to attract customers in the interbrand equipment market would keep it from charging higher than competitive prices for service.[16] Pet. App. at 9A. The court noted that "appellants do not dispute that equipment purchasers consider the cost of parts and service when initially deciding between Kodak's equipment and competitors' equipment." Pet. App. at 8A. Nonetheless, the Ninth Circuit dismissed the price discipline of the interbrand market as "theoretical." Pet. App. at 10A.

In the face of this economically rational explanation of why Kodak possessed no market power in the market for Kodak replacement parts, the court did not require the respondents to identify any particular "market imperfections" that would keep the market from functioning as economic theory would predict. Instead, the Ninth Circuit held that "[i]t is enough that appellants have presented evidence of actual events from which a reasonable trier of fact could conclude that . . . competition in the interbrand market does not, in reality, curb Kodak's power in the parts market." Pet. App. at 10A.

The evidence found to be sufficient to survive summary judgment on the issue of market power consisted of (1) evidence that Kodak's service charges were higher than those charged by ISOs for lower quality service; and (2) evidence that competition from ISOs sometimes caused Kodak to lower its price for service. Pet. App. at 10A-11A. In practice, anecdotal evidence of such general factors can almost always be found. If such minimal

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[16] The Ninth Circuit's aftermarket analysis leads to a counter-intuitive result. The court concedes that a manufacturer could tie both replacement parts and service to the copier system if it did not have market power in the interbrand market for copier systems. Pet. App. at 8A-9A. However, the court held that a *less* restrictive arrangement, an alleged tie of service to parts without any tie to equipment, is subject to antitrust challenge.

evidence is sufficient to establish a disputed issue of fact on the existence of market power in an aftermarket, in spite of the absence of market power in the interbrand market and the customers' consideration of parts and service costs in making interbrand decisions, then summary judgment virtually never will be granted. The evidence relied upon by the Ninth Circuit plainly falls far short of the "more persuasive evidence" test established by this Court in *Matsushita*, threatening an explosion of burdensome jury trials against manufacturers in competitive industries.

CONCLUSION

For the foregoing reasons, Kodak's petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 90-1029

In The

Supreme Court of the United States

October Term, 1990

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICE, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, d/b/a G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS, INC.; BOB INGLE INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, d/b/a MICRO IMAGE INC.; MIDWEST MICROFILM EQUIPMENT & SERVICES, INC.; OMNI MICROGRAPHIC SERVICES INC.; AND CPO, LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

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EASTMAN KODAK COMPANY,

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IMAGE TECHNICAL SERVICE, INC., ET AL.,

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RESPONDENTS' SUPPLEMENTAL BRIEF

This supplemental brief is submitted by respondents pursuant to Rule 15.7 of the Rules of this Court in reply to the *amicus curiae* brief filed by the United States.

INTRODUCTION

The Solicitor General argues that certiorari should be granted in this case because all that is complained of is "proper competitive behavior". Solicitor General's Brief ("S.G. Br.") at 17. However, because the District Court granted summary judgment after allowing only one limited set of interrogatories, one limited request for

documents and six depositions (and after denying further discovery), Pet. App. 36B-37B, Br. in Opp. 4-5, there is no factual or theoretical basis for concluding that Kodak lacks power in the parts or service markets, or that the restrictions Kodak imposes on the sale of replacement parts constitute proper competitive behavior. The record shows otherwise.

I. THE LIMITED RECORD BELOW DEMONSTRATES THAT, CONTRARY TO THE ASSERTIONS OF THE SOLICITOR GENERAL, RESPONDENTS' CLAIMS OF KODAK POWER IN THE PARTS MARKET CANNOT BE REJECTED AS A MATTER OF LAW

The Solicitor General seems convinced that respondents' market power argument is "inherently implausible", because respondents supposedly conceded below that potential equipment buyers "consider the cost of parts and service when initially deciding between Kodak's equipment and its competitors' equipment." S.G. Br. 3. The Solicitor General then argues that this concession means not only that Kodak equipment customers are not "locked in", but also that Kodak cannot set its prices for parts and service without regard to the effect of those prices in the interbrand equipment market. *Id.* at 11.

The Solicitor General cites the Ninth Circuit's majority opinion for respondents' supposed concession. Pet. App. 8A. The supposed concession was also relied upon in Judge Wallace's dissent. *Id.* at 20A. However, neither opinion cites any source for the purported concession. Both opinions are mistaken, because there was no such concession in the record below. In the proceedings before the District Court, respondents challenged the assumption that equipment buyers consider the costs of parts

and service before making their purchases in the basic equipment market. This was done through the declaration of the president of respondent Image Technical Services, Inc.[1] It is apparent from reading the Solicitor General's brief that this is a fundamental misapprehension about the record below.[2] Now that it has been corrected, respondents believe it obviates any need for review by this Court.

However, the Solicitor General may also be saying that even if respondents do not concede that customers consider the cost of parts and service before they purchase equipment, it is still so implausible that information about aftermarket costs would not be taken into account at the time equipment is purchased that respondents should not be given the opportunity to develop contrary evidence. If that is what the Solicitor General is

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[1] Paragraphs 61 and 62 of the declaration of Paul Hernandez, president of Image Technical Services, Inc., provide in full:

> 61. From my experience at Kodak and ITS, customers, including the Instant Copy Service which I am a partner in, do not go through a life cycle cost analysis for machines before purchasing the machines.
>
> 62. In some cases, like Federal government agencies, different departments purchase micrographics and photocopy equipment from the departments who pay for the service. The Department of Defense purchases equipment for the Air Force. Yet when service is ordered from ITS for McClellan Air Force Base micrographics and photocopy machines, the base buy[s] and pays for that service separate from its machine purchases.

See also footnote 4, *infra*.

[2] Rule 15.1 of this Court urges respondents to highlight perceived misstatements of fact that have a bearing on what issues are properly before the Court if certiorari is granted.

advocating, he is really seeking the adoption in the abstract of "Chicago School" ideology. This is an approach that is contrary to real-world facts, existing law and competing economic theories. Spivack, The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response, 51 ANTITRUST L.J. 651 (1983) (hereinafter "Spivack").[3]

Even if this Court were to consider it appropriate to supplant established law with Chicago School theory, it should not do so on the limited record below. That is because there are at least two circumstances in which even proponents of the Chicago School might concede that market power could be exercised in parts and service aftermarkets for a single brand of equipment. The first such situation is where the basic equipment market is oligopolistic. In a basic equipment market in which there is tacit collusion among a few large firms, there may be an economic incentive for the firms to avoid competitive pricing as to parts and service for their respective products. P. Areeda, 6 Antitrust Law ¶ 1432b2 (1986). Such tacit collusion to facilitate the firms' power in their respective aftermarkets is plausible and should be open to proof.

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[3] The Chicago School has adopted as an item of belief "that the market will adequately discipline non-profit maximizing conduct . . . [I]f conduct is not profit maximizing, it is 'self-deterring,' and . . . there is therefore no reason for 'trundling out the great machinery of antitrust enforcement' to prevent it. This assumption is nothing but an intuitive value judgment that the cost of enforcing the antitrust laws is always greater than the damage inflicted on the economy by conduct that is not profit maximizing." Spivack at 671 (citation omitted).

The second situation where market power might exist under Chicago School assumptions is where significant numbers of equipment buyers receive imperfect information about costs in parts and service aftermarkets. In such a situation, market power can exist, at least in the short run. That possibility exists here, because respondents demonstrated below that (1) Kodak changed its parts policy in 1985-86, so that customers who bought Kodak equipment before then could not have known that a tie would be imposed,[4] and (2) it is difficult even today for customers to conduct life-cycle costing before they decide which brand of equipment to purchase.[5]

If, as respondents have alleged, Kodak has power through replacement parts to foreclose competition for the servicing of Kodak machines, and has used that power with the purpose and effect of bringing about such

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[4] In footnote 11 of his brief, the Solicitor General appears to misapprehend the facts and the significance of the *parts* sales contract (which is separate from the *equipment* sales contract and is not seen by equipment buyers). The crucial point is not that post-1986 *parts* contracts may clearly spell out Kodak's restrictive parts policy (even assuming equipment buyers see such contracts), but that parts contracts before 1986 not only failed to spell out Kodak's restrictive parts policy, but stated exactly the opposite: that parts were available to all buyers, including ISOs. Declaration of Paul Hernandez, paragraph 15.

[5] Thus, the Solicitor General errs when he asserts that the opinion below relied upon unspecified market imperfections. S.G. Br. 8-9. Evidence of unusually large profits in the parts and service aftermarkets would also be relevant to the possibility of Kodak market power in these aftermarkets. Pitofsky, New Definitions of Relevant Market And The Assault On Antitrust, 90 COLUM L. REV. 1805, 1848-49 (1990).

foreclosure, there is cognizable injury and discovery should proceed in this case without further delay.[6]

II. THE DECISION BELOW IS NOT INCONSISTENT WITH ESTABLISHED TYING LAW, NOR IS IT A SUITABLE VEHICLE FOR CONSIDERING THE EFFECT OF LOCK-INS ON TYING CLAIMS

In addition to his general attack upon the Ninth Circuit's discussion of market power, the Solicitor General argues that the decision below cannot be squared with the framework for analyzing tie-in claims set forth in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). The Solicitor General asserts that the decision below "reads the substance out of the market power requirement of *Hyde*," and further represents an unwarranted extension of the holding in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985), that a "lock-in" can enhance the seller's market power for the tying product. S.G. Br. 12-15.

Neither of these arguments withstands scrutiny. It is evident from the Court of Appeals' opinion that it understood a *per se* tying claim requires a showing of market

---

[6] As Spivack observes:

> The tie-in or leverage area is one in which Chicago School theory comes into clear conflict with some of the principal non-economic goals of antitrust – preserving a deconcentrated industrial structure, dispersing economic power, and providing free access to markets. By engaging in an effective tying arrangement, a monopolist can drive equally or even more efficient competitors in the tied product market out of business.

Spivack at 663-64.

power for the tying product. Pet. App. 4A, 7A. The Ninth Circuit found that on the limited record before it, respondents had presented sufficient evidence to withstand summary judgment on this issue, because they adequately demonstrated that (1) Kodak parts are unique, and (2) the power of this uniqueness is enhanced by the fact Kodak equipment customers are "locked in" to Kodak for replacement parts. *Id.* at 7A-8A, 10A-11A. This conclusion is consistent with the ruling in *Hyde* that market power can be established by showing that the tying product is unique, 466 U.S. at 17, and with the ruling in *Digidyne* that the tying product's market power can be enhanced through a "lock-in", 734 F.2d at 1342-43.

The Solicitor General also faults the Ninth Circuit's tying conclusions because (1) they are based upon complaints by a "a handful of objecting customers", and (2) they ignore the constraints allegedly imposed by competition in the interbrand equipment market on a manufacturer's exercise of power in the replacement parts market. S.G. Br. 13-14.

The first complaint is based more on wishful thinking than on a sound reading of precedent. The language about "a handful of objecting customers" comes not from a decision of this Court, but from the First Circuit's decision in *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988). It must be read in light of that court's holding that objections to overinclusive parts kits by only 3 of 64 affected auto dealers did not suffice, standing alone, to prove market power, 858 F.2d at 797-98. Neither *Grappone* nor any other case, however, establishes a rule that complaints by customers are not probative evidence of market power. After all, it is through such complaints that a tie-in is often proven. If

respondents had been offered more discovery in the District Court, they might well have found enough other objecting Kodak customers to satisfy even the Solicitor General.

To the extent the Solicitor General is suggesting that certiorari should be granted in this case to examine the lock-in concept, S.G. Br. 14-16 & fn. 16, it is apparent that better cases exist for that purpose than this one. For example, in the *Virtual Maintenance* case now pending in the Sixth Circuit, Pet. App. 43E, a jury found that Prime Computer violated section 1 of the Sherman Act by tying software upgrades to the purchase of hardware maintenance service from Prime (which has less than a dominant share in the market for sale and service of computers). In *HyPoint Technology*, also pending before the Sixth Circuit (*id.*), Hewlett Packard was found to have monopolized the market for maintenance of its brand of minicomputers, even though it has less than a dominant share in the market for sale and service of all computers. Either of these cases would permit the Court to review the market power issues raised by this case on a full trial record, rather than on the meager record that resulted from the premature grant of summary judgment here.

III. THE THINNESS OF THE RECORD MAKES THIS AN UNSUITABLE CASE FOR CONSIDERING THE ROLE OF SUMMARY JUDGMENT IN ANTITRUST CASES

The Solicitor General's final reason for urging that certiorari be granted is that this case "presents an appropriate occasion to emphasize the critical role of summary judgment in antitrust litigation." S.G. Br. 16.

Of all the Solicitor General's reasons for granting certiorari, this is the weakest. If, as the Solicitor General asserts, procompetitive and anticompetitive behavior can appear "indistinguishable" when "judged from a distance", *id.*, then that is an argument for having full discovery – including expert economic testimony – before summary judgment is considered. Without such a record, one cannot tell whether Kodak or any other party has engaged in "proper competitive behavior." *Id.* at 17.

The Solicitor General's argument finds no support in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). That was a case in which, after "several years of detailed discovery" (*id.* at 578), plaintiffs were able to produce only indirect, circumstantial evidence of the alleged predatory pricing conspiracy. Because permitting an inference of conspiracy to be drawn from such evidence might "deter procompetitive conduct", *id.* at 593, this Court held that the plaintiffs were required to "come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587.

This case, unlike *Matsushita*, alleges mainly unilateral conduct by Kodak. But even in cases where *Matsushita's* relevance is unquestioned – i.e. in conspiracy cases where the only evidence of conspiracy is circumstantial – it has not been read as permitting summary judgment for defendants

> whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible. Allowing the district court to make that decision would lead to a dramatic judicial encroachment on the province of the jury.

In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation, 906 F.2d 432, 438 (9th Cir. 1990), *cert.*

denied, No. 90-1552 (June 3, 1991). Rather, where the defendant's conduct is consistent with lawful behavior as well as conspiracy, summary judgment can be granted only if "permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." *Id.* at 440.

Under this interpretation of *Matsushita* – which this Court declined to review only a few days ago – a full record with sufficient expert testimony to make the necessary economic determinations is obviously required. In this case, where the evidence developed thus far is conceded to be as consistent with the existence of market power as with its absence, S.G. Br. 17, an equally full record is required and summary judgment was inappropriate.

CONCLUSION

The arguments for granting certiorari here are based upon a misperception of facts and -- in view of the sparse record below -- upon "speculation" about "as yet undiscovered and unidentified facts". *Id.* It is these which form the basis for the Solicitor General's conclusion that Kodak's practices are lawful. Certiorari should accordingly be denied.

Respectfully submitted,

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Dated: June 10, 1991

No. 90-1029

Supreme Court, U.S.
FILED
JUL 31 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, d/b/a G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, d/b/a MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; and CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Petition For Certiorari Filed December 20, 1990
Certiorari Granted June 17, 1991

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September 21, 1990	Order of Ninth Circuit Court of Appeals Denying Petition for Rehearing and Rejecting Suggestion of Rehearing En Banc
June 17, 1991	Order of United States Supreme Court Granting Certiorari

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., a California corporation; J-E-S-P, COMPANY, INC., a New Jersey corporation; SHIELDS BUSINESS MACHINES, INC., a Pennsylvania corporation; MICROGRAPHIC SERVICES, INC., a Missouri corporation; MICRO MAINTENANCE, INC., an Illinois corporation; ATLANTA GENERAL MICROFILM, CO., INC., a Georgia corporation; ROGER KATONA d/b/a G.&S. ELECTRONICS, a California partnership; AMTECH EQUIPMENT MAINTENANCE, INC., a Minnesota Corporation; ADVANCED SYSTEMS SERVICE, INC., a Colorado corporation; B.C.S. TECHNICAL SERVICES, INC., a Colorado corporation; BOB INGLE, INC., a Missouri corporation; DATA PROX EQUIPMENT CO., a New Jersey corporation; FISHER	)	No. C 87 1686 WWS COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF Tie-ins; Monopolization; Attempt to Monopolize; Combinations, Contracts, and Conspiracies in Restraint of Trade; Pendent State Claims for Anti-competitive Acts; Breach of Contract; Breach of Covenant of Good Faith and Fair Dealing; Interference with Contractual Relationships and Prospective Economic Advantage; and Unfair Business Practices

MICROGRAPHICS, INC., a Missouri corporation; I.O.A. DATA CORP., a New York corporation; SEARLE ENTERPRISES, INC., d/b/a/ MICRO IMAGE, a Texas corporation; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC., a Minnesota corporation; OMNI MICROGRAPHIC SERVICES, INC., a California corporation; and CPO, LTD., a California corporation, Plaintiffs, vs. EASTMAN KODAK COMPANY, a New Jersey corporation, Defendant.	)	DEMAND FOR JURY TRIAL

Plaintiffs herein, demanding a trial by jury, allege as follows:

FIRST CLAIM FOR RELIEF
(All Plaintiffs)

(Tie-Ins – Sherman Act § 1, Clayton Act § 3)

Jurisdiction and Venue

1. The jurisdiction of this court is invoked, and this action is instituted under the provisions of Section 1337 of Title 28, United States Code (28 U.S.C. § 1337) and Sections 4, 12, and 16 of the Clayton Act (15 U.S.C. §§ 15,

22 and 26) to declare the rights of plaintiffs, to prevent and restrain the unlawful acts of defendant, and to recover damages sustained by plaintiffs as a result of violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), violations of Section 3 of the Clayton Act (15 U.S.C. § 14), and violations of state laws.

2. **Defendant Eastman Kodak Company** (hereinafter "Kodak") has offices in the Northern District of California, and is qualified to do business in California. Kodak does a substantial amount of business in the the Northern District of California, including substantial sales of Kodak micrographic and photocopy equipment and substantial repair, service and parts distribution for said equipment. Kodak, as hereinafter set forth, has intentionally violated Section 1 and Section 2 of the Sherman Act and Section 3 of the Clayton Act through acts which, in part, occurred in the Northern District of California and which have injured plaintiffs, and each of them, in their trade and business.

Description of Plaintiffs

3. **Plaintiff Image Technical Service, Inc.** (hereinafter "ITS") is a corporation organized and in good standing under the laws of the State of California and has its principal place of business in Sacramento, California.

4. **Plaintiff J-E-S-P, Company, Inc.,** (hereinafter "J-E-S-P") is a corporation organized and in good standing under the laws of the State of New Jersey and has its principal place of business in East Brunswick, New Jersey.

5. **Plaintiff Shields Business Machines, Inc.** (hereinafter "Shields"), is a corporation organized and in good standing under the laws of the State of Pennsylvania and has its principal place of business in Philadelphia, Pennsylvania.

6. **Plaintiff Micrographic Services, Inc.** (hereinafter "Micrographic Services") is a corporation organized and in good standing under the laws of the State of Missouri and has its principal place of business in Republic, Missouri.

7. **Plaintiff Micro Maintenance, Inc.** (hereinafter "Micro Maintenance") is a corporation organized and in good standing under the laws of the State of Illinois and has its principal place of business in Burbank, Illinois.

8. **Plaintiff Atlanta General Microfilm Co., Inc.** (hereinafter "Atlanta General") is a corporation organized and in good standing under the laws of the State of Georgia and has its principal place of business in Atlanta, Georgia.

9. **Plaintiff Roger Katona, d/b/a G.&S. Electronics** (hereinafter "G&S"), is a general partnership organized and in good standing under the laws of the State of California with its principal place of business in Chino, California.

10. **Plaintiff Amtec Equipment Maintenance, Inc.** (hereinafter "Amtec") is a corporation organized and in good standing under the laws of the State of Minnesota and has its principal place of business in St. Paul, Minnesota.

11. **Plaintiff Advanced Systems Service, Inc.** (hereinafter "Advanced") is a corporation organized and in good standing under the laws of the State of Colorado and has its principal place of business in Denver, Colorado.

12. **Plaintiff B.C.S. Technical Services, Inc.** (hereinafter "BCS") is a corporation organized and in good standing under the laws of the State of Colorado and has its principal place of business in Denver, Colorado.

13. **Plaintiff Bob Ingle, Inc.,** (hereinafter "Ingle") is a corporation organized and in good standing under the laws of the State of Missouri and has its principal place of business in Excelsior Springs, Missouri.

14. **Plaintiff Data Prox Equipment Co.** (hereinafter "Data Prox") is a corporation organized and in good standing under the laws of the State of New Jersey, and has its principal place of business in Hillside, New Jersey.

15. **Plaintiff Fisher Micrographics, Inc.** (hereinafter "Fisher") is a corporation organized and in good standing under the laws of the State of Missouri, and has its principal place of business in St. Louis, Missouri.

16. **Plaintiff I.O.A. Data Corp.** (hereinafter "IOA") is a corporation organized and in good standing under the laws of the State of New York, and has its principal place of business in New York, New York.

17. **Plaintiff Searle Enterprises, Inc.** d/b/a Micro Image (hereinafter "Searle") is a corporation organized and in good standing under the laws of the State of Texas, and has its principal place of business in Spring, Texas.

18. **Plaintiff Midwest Microfilm Equipment & Service, Inc.** (hereinafter "Midwest") is a corporation organized and in good standing under the laws of the State of Minnesota and has its principal place of business in Golden Valley, Minnesota.

19. **Plaintiff Omni Micrographic Services, Inc.** (hereinafter "Omni") is a corporation organized and in good standing under the laws of the State of California and has its principal place of business in Milpitas, California.

20. **Plaintiff CPO Ltd.** (hereinafter "CPO") is a corporation organized and in good standing under the laws of the State of California and has its principal place of business in Santa Clara, California.

21. Plaintiffs are engaged in the trade and business of providing repairs and service for Kodak micrographic and photocopy equipment. Plaintiffs are also engaged in the trade and business of buying, reconditioning and selling used and reconditioned Kodak micrographic and photocopy equipment. At all times material to this action, plaintiffs were and are so engaged in said trades and businesses. Plaintiffs are in direct competition with Kodak in the bidding on, sale of and providing for repairs and service of Kodak micrographic and photocopy equipment and in the purchase and sale of used Kodak micrographic and photocopy equipment.

22. Plaintiffs purchase their parts, tools, test equipment, supplies, service manuals, and specifications for Kodak micrographic and photocopy equipment (hereinafter "parts") from Kodak. Said parts are produced and

sold in the several states. Plaintiffs sell repairs and service for Kodak micrographic and photocopy machines in the several states. Plaintiffs also purchase and sell used Kodak micrographic and photocopy equipment. Said micrographic and photocopy equipment is purchased and sold in the several states. Customers of plaintiffs who purchase used micrographic and photocopy equipment also purchase parts, repairs and service for said equipment from Kodak and others. Said parts, repairs and service are purchased and provided in the several states.

23. The availability of said Kodak parts is critical to plaintiffs in their businesses to recondition, sell, repair, and service Kodak micrographic and photocopy equipment. Without these parts plaintiffs cannot operate their businesses in competition with Kodak. Most parts for Kodak micrographic and photocopy equipment are distributed in the United States only by Kodak, and are manufactured by Kodak or by other entities solely for Kodak.

Description of Defendant

24. Defendant Kodak is a corporation duly organized and existing under the laws of the State of New Jersey and has its principal place of business in Rochester, New York. Kodak manufactures, markets, sells and distributes various photographic products. These products include micrographic and photocopy equipment, as well as the supplies and parts for such equipment. Kodak also provides repairs and service for such equipment. Kodak

manufactures, markets, sells and distributes its equipment under its own brand names. Kodak also manufactures or publishes, or causes to be manufactured or published, on an original equipment manufacture basis (hereinafter "OEM"), all of the parts for the repair and service of its micrographic and photocopy equipment. None of these products is manufactured or sold in the United States in any appreciable volume or on any basis other than directly through Kodak. Kodak provides repairs and service for Kodak micrographic and photocopy equipment. Except for plaintiffs said repairs and service are not provided in the United States in any appreciable volume or on any basis other than directly by Kodak. Kodak also reconditions and sells used Kodak micrographic and photocopy equipment.

25. Kodak micrographic and photocopy equipment – both new and used – is sold through its Business Systems Markets Division (hereinafter "BSMD"). Kodak micrographic and photocopy equipment is repaired and serviced by Kodak's Customer Equipment Services Division (hereinafter "CESD") either under a standardized annual service contract called an equipment maintenance agreement (hereinafter "EMA"), or on a "per call" basis. Customers whose equipment is repaired or serviced on a "per call" basis are charged for service and parts separately. A large majority of Kodak micrographic or photocopy equipment owners use Kodak service and purchase EMA contracts largely because of Kodak's control over parts for the service of its micrographic and photocopy equipment and its policies with regard to service and parts as set out herein.

Nature of the Trade and Commerce

26. Within the industry for micrographic and photocopy equipment, purchasers of micrographic and photocopy equipment and consumers of the parts and service for that equipment are recognized according to the brand of equipment they own. Members of the industry understand and agree that the brand of equipment differentiates the various purchasers and consumers. Separate and distinct parts and service organizations have developed for service of each of the major micrographic and photocopy equipment brands. Different marketing strategies are employed in attempting to sell micrographic and photocopy equipment, parts and service to owners of different brands of equipment. Distinct prices are employed based on the brands of equipment. Different sensitivities to price changes exist as to the different brands of equipment and as to parts and service for different brands of equipment.

27. Kodak micrographic and photocopy equipment are unique products. Kodak is one of the best brands of micrographic and photocopy equipment and commands a reputation for quality. It is differentiated in the industry as to users, price, marketing strategies, and price elasticity. Parts and service for Kodak micrographic and photocopy equipment are likewise differentiated from parts and service for other brands.

28. Owners of Kodak brand micrographic and photocopy equipment are locked-into purchasing additional Kodak equipment, and to purchasing Kodak parts and service for their equipment because of a number of factors. These factors include the high capital investment in

the equipment, the uniqueness of Kodak micrographic and photocopy equipment, the control by Kodak of parts, the control by Kodak of service, the control by Kodak of resale of used Kodak equipment, the difference in microfilm formats, the difference in operator skills between different brands of equipment, the difficulty of obtaining single-source repair and service for diverse equipment brands, and numerous other practical factors in the marketplace.

29. Competition in the manufacture and sale of Kodak micrographic and photocopy equipment, as well as in parts, repair and service of such equipment is dominated by Kodak. Barriers to entry into the manufacture of Kodak micrographic and photocopy equipment, into the manufacture of parts and into repair and service for such equipment are high. The manufacture of said equipment and parts, and the repair and service of said equipment require high technical expertise and a long lead time to develop. Kodak has established a monopoly in the sale of its micrographic and photocopy equipment through its control over manufacture and distribution of such equipment and its control over parts and service for such equipment. Kodak has established a monopoly in the repair and service of Kodak micrographic and photocopy equipment through its control over parts for this equipment. Kodak has established a monopoly over parts for Kodak micrographic and photocopy equipment through its control over the manufacture, distribution and service for such equipment.

30. Prior to plaintiffs' entry into the sales and the service markets for Kodak micrographic and photocopy equipment, Kodak enjoyed a unique and profitable

monopoly position in its sales and servicing of Kodak micrographic and photocopy equipment and accordingly charged substantially higher prices for its sales and for its repair and service of such equipment before the entry of plaintiffs into these markets.

31. Plaintiffs have purchased parts for the reconditioning, repair and service of Kodak photocopy equipment from Kodak in the past. Plaintiffs have purchased parts for the reconditioning, repair and service of Kodak micrographic equipment from Kodak in the past, and continue to purchase some of said parts from Kodak. Some customers of plaintiffs who purchase used or reconditioned micrographic and photocopy equipment from plaintiffs have purchased repairs and service for this equipment from Kodak in the past and some continue to do so.

32. The parts for repair, service, and reconditioning of Kodak micrographic and photocopy equipment are supplied through Kodak's CESD Parts Services. The written "Terms of Sale" for the purchase of Kodak parts from CESD provided in November 1985, as one of its "CESD Replacement Parts Principles," that:

> "Kodak distributes parts throughout the world and does not rely upon dealers, agents, or distributors in the U.S. to perform this distribution function. Therefore, Kodak will sell replacement parts to any party who intends to use them to repair Kodak equipment."

Said Terms of Sale also provided that:

> "If, at any time, it becomes necessary to discontinue shipments to any of its customers, to revoke or modify any of these terms of sale, or to allocate distribution of any of its products, Kodak shall take whatever action in its judgment is fair and appropriate."

33. In the past Kodak has made parts for Kodak micrographic and photocopy equipment available to "any party" on short notice or on a rush basis, providing for overnight delivery anywhere in the United States. Kodak has continued to sell parts for its micrographic and photocopy equipment on the same basis to equipment owners who repair and service their own equipment, to some independent service organizations and to authorized Kodak dealers, but not to plaintiffs. In the past Kodak has made ten percent (10%) discount available to purchasers of parts who did not require shipment on short notice or a rush basis, and continues to do so for some customers, but not for plaintiffs.

34. Prior to April, 1985, Kodak had sold parts for all Kodak micrographic equipment to plaintiffs, including parts for newly introduced micrographic equipment. Prior to July 1985, Kodak had also sold parts for all Kodak photocopy equipment to plaintiffs.

35. In reliance upon these policies of Kodak prior to April 1985, with regard to micrographic equipment, and prior to July 1985, with regard to photocopy equipment, and based upon the Replacement Parts Principles and the Terms of Sale of CESD for the sale of such parts to "any party," plaintiffs: (1) purchased said parts for the repair, servicing and reconditioning of Kodak micrographic and photocopy equipment; (2) recruited, hired and trained qualified personnel, including many Kodak-trained technicians with expertise in the servicing of Kodak micrographic and photocopy equipment; (3) developed

customer bases for the service and sale of Kodak micrographic and photocopy equipment; (4) bid for and received many contracts in the public and private sectors to repair, service and supply such equipment; and, (5) sold used and reconditioned Kodak micrographic and photocopy equipment.

36. Prior to April 1985, with regard to micrographic equipment, and prior to July 1986, with regard to photocopy equipment, Kodak had supplied repair and service for Kodak micrographic and photocopy equipment irrespective of whether the equipment had been purchased by the owner directly from Kodak or had been purchased as used or reconditioned equipment from plaintiffs. In reliance upon said policy, plaintiffs developed their businesses, hired and trained qualified personnel and developed customer bases for the reconditioning of and for the sale of used and reconditioned Kodak micrographic and photocopy equipment. Plaintiffs purchased, reconditioned and sold used and reconditioned Kodak micrographic and photocopy equipment in competition with Kodak and developed substantial inventories in said equipment as well as goodwill in the industry.

37. Plaintiffs have been awarded term contracts for the repair and service of Kodak micrographic and photocopy equipment in competition with Kodak by state and local governmental entities and private business organizations, usually through the bid process. Often, plaintiffs and Kodak were the only bidders for such contracts.

Unlawful Acts of Defendant

38. Beginning in or about April 1985, Kodak adopted a new policy under which it refused to sell parts on all newly introduced micrographic equipment to independent service organizations, including plaintiffs. These parts were, however, made available to Kodak Equipment Service Representatives (hereinafter "ESR"), government customers, and to Kodak equipment owners who repaired and serviced their own micrographic equipment.

39. Beginning in or about July 1985, with regard to photocopy equipment, and beginning in or about July 1986, with regard to micrographic equipment, and after the award of term contracts to plaintiffs by state and local governmental agencies and by private business organizations for the repair of such equipment, Kodak refused to sell to plaintiffs, or sold to plaintiffs only on discriminatory, unreasonable and economically unviable terms, parts for the service of Kodak micrographic and photocopy equipment.

40. Since said dates Kodak has arbitrarily and discriminatorily "flagged" plaintiffs' and others parts accounts at CESD solely because they compete with Kodak on a large scale and has delayed delivery or refused sale of parts to plaintiffs on the basis of: (1) spurious credit terms; (2) arbitrary definitions of parts or of parts categories (such as "all-time parts" which are not available to plaintiffs); (3) phantom parts shortages; and, (4) other reasons not related to fact or legitimate economic or business interests.

41. Plaintiffs have attempted, since said dates, to place orders for said parts, just as they had been placed

in the past. Often "control numbers" were provided by CESD, but the parts were never shipped by Kodak or new "control numbers" were issued after long delays. Often the long delays were unexplained or plaintiffs were unable to get the parts, while other purchasers, not competing with Kodak, received the same parts on an expeditious basis. Often new, unexplained or unjustified credit terms, or terms of sale were used by Kodak to delay or block plaintiffs' purchases. Kodak has refused to give to plaintiffs legitimate economic or business reasons for its purported change in policy and its current practices.

42. These policies of Kodak in refusing to sell parts, or selling them on unreasonable terms, were instituted by Kodak despite prior sales by Kodak of parts to plaintiffs on non-discriminatory, reasonable and economically viable terms, despite the "Replacement Parts Principles" and the "Terms of Sale" existing theretofore, and despite the continuing sales of parts on non discriminatory, reasonable and economically viable terms, to some parties outside of Kodak's CESD. These parties included governmental entities, owners of Kodak equipment purchased directly from Kodak, and independent service organizations either not competing directly with Kodak or not competing in any appreciable volume with Kodak.

43. Plaintiffs have attempted to purchase Kodak parts through other companies which own and service their own Kodak micrographic and photocopy equipment and through bona fide Kodak dealers who have been allowed to purchase such items directly from Kodak, but plaintiffs have largely been unable to do so because of Kodak's policies and actions.

44. Beginning in or about November 1986 Kodak adopted a policy under which it refused to sell parts for Kodak micrographic or photocopy equipment to some owners of Kodak micrographic or photocopy equipment solely on the basis that the owner competed with Kodak for service of equipment. On this basis, Kodak has refused to sell parts to plaintiffs even though they have purchased micrographic and photocopy equipment directly from Kodak, solely because plaintiffs compete with Kodak in the service of Kodak equipment.

45. Kodak has also engaged in practices which discriminate against plaintiffs in their purchases of Kodak micrographic and photocopy equipment parts, when such parts are, or were available, by: (1) refusing to give plaintiffs discounts available to other customers; (2) providing free parts to Kodak CESD customers; and, (3) charging plaintiffs over two times the price that is charged to other customers at the same distribution level for some parts.

46. Parts for Kodak micrographic and photocopy equipment, which Kodak now refuses to sell directly to plaintiffs and as to which Kodak refuses to allow indirect sales to plaintiffs, are absolutely necessary for the repair and service of Kodak micrographic and photocopy equipment under plaintiffs' contracts with state and local governmental entities and with private entities.

47. If plaintiffs are unable to perform on contracts to service Kodak micrographic and photocopy equipment with state and local entities, they can be formally "black-listed" for such contracts, preventing them from submitting bids on any other government contracts for a period of years. The "black-listing" of plaintiffs by state and

local governments would eliminate them as competitors to Kodak in the sales, repair and service of Kodak micrographic and photocopy equipment in these markets.

48. Beginning in or about April 1985 Kodak began to refuse repair, service and parts for used Kodak micrographic and photocopy equipment sold by plaintiffs or to provide these only on discriminatory, unreasonable and economically unviable terms and conditions. Kodak's actions in this respect have included, but are not limited to: (1) the cut-off of parts to plaintiffs by Kodak; (2) the requiring by Kodak of unreasonable transportation, inspection, reconditioning, certification or modification charges; (3) the requiring by Kodak of the purchase of a Kodak EMA; (4) the refusing by Kodak of repairs or service altogether; and, (5) the sale of parts to equipment owners who purchased their equipment directly from Kodak, while refusing sale to owners of the same equipment purchased from plaintiffs. Said actions were often taken without regard to the condition of the equipment, the prior service on the equipment or for any other legitimate reason.

49. Kodak has represented to owners of Kodak micrographic and photocopy equipment that plaintiffs are unable to get parts for Kodak micrographic and photocopy equipment, will be unable to repair or service such equipment, and will not be in business to fulfill their contracts for repair and service of such equipment.

50. Kodak has represented to owners of Kodak micrographic and photocopy equipment, and to potential owners of said equipment that plaintiffs who recondition

such equipment, or who broker used and reconditioned Kodak equipment will be put out of business by Kodak.

51. Kodak has refused repairs or service for Kodak micrographic and photocopy equipment where non-Kodak parts have been used or where plaintiffs' services have been employed by owners of Kodak micrographic and photocopy equipment.

52. Kodak has entered into contracts, combinations and conspiracies with OEM suppliers of parts for Kodak micrographic and photocopy equipment to prevent them from providing plaintiffs with parts for Kodak micrographic and photocopy equipment.

53. Kodak has entered into contracts, combinations and conspiracies with owners of Kodak micrographic and photocopy equipment who purchase parts for such eqiupment from Kodak to prevent the sale of such parts to plaintiffs who recondition, repair and service Kodak micrographic and photocopy equipment.

54. Kodak has entered into contracts, combinations and conspiracies to prevent the sale of used and reconditioned Kodak micrographic and photocopy equipment by plaintiffs through the aforesaid acts and practices of Kodak and by forbidding the sale of parts by customers of Kodak to persons who purchase used and reconditioned equipment from plaintiffs.

55. Kodak has entered into contracts, combinations and conspiracies with organizations which repair and service Kodak micrographic and photocopy equipment to allocate territories for such repair and service, to refuse to deal with plaintiffs and to exclude plaintiffs from such

repair and service through the denial of parts to plaintiffs.

56. Kodak has also entered into contracts, combinations and conspiracies with entities financing Kodak micrographic and photocopy equipment to prevent plaintiffs from doing repair and service of said equipment by requiring as a condition or understanding of said financing that Kodak's CESD repair and service be used.

57. Due to the aforesaid acts and practices of Kodak, Kodak has required that customers use Kodak repair and service for micrographic and photocopy equipment as a condition to obtaining parts for said equipment. Customers of Kodak purchasing Kodak micrographic and photocopy equipment and related accessories from Kodak or others, as well as existing owners of Kodak micrographic and photocopy equipment purchased from Kodak or others, due to the aforesaid acts and Kodak's foreclosure of the relevant market, have been and are required to contract with Kodak for the repair and service of said equipment, thereby constituting unlawful "tie-in" arrangements in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

58. Due to the aforesaid acts and practices of Kodak, customers purchasing Kodak micrographic and photocopy equipment have been and are required to purchase parts and service from Kodak as a condition to purchasing said equipment, thereby constituting unlawful "tie-in" arrangements in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C.

§ 1), commonly known as the Sherman Act, and in violation of Section 3 of the Act of Congress of October 15, 1914, as amended (15 U.S.C. § 14), commonly known as the Clayton Act.

59. Customers purchasing Kodak micrographic and photocopy equipment, due to the aforesaid acts and practices of Kodak, have been and are required to purchase equipment directly from Kodak as a condition to obtaining parts for said equipment, thereby constituting unlawful "tie-in" arrangements in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act, and in violation of Section 3 of the Act of Congress of October 15, 1914, as amended (15 U.S.C. § 14), commonly known as the Clayton Act.

Injury

60. By reason of Kodak's aforesaid unlawful conduct and as a direct and proximate result of such conduct plaintiffs have lost sales, profits and value of their businesses. Plaintiffs have suffered and will continue to suffer irreparable harm through loss of and injury to their trade and business in that: (1) plaintiffs have been and will be precluded from entering into contracts for the sale, service and repair of Kodak micrographic and photocopy equipment; (2) plaintiffs have been and will be precluded from carrying out contracts already entered into for the sale, service and repair of Kodak micrographic and photocopy equipment; (3) plaintiffs have been and will continue to be irreparably harmed in their reputations and goodwill; (4) plaintiffs and others will be eliminated from

the sale, repair and service of Kodak micrographic and photocopy equipment; and, (5) independent sources for Kodak equipment parts will be eliminated.

61. The aforesaid violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act have had and will continue to have the following effects, among others:

(a) Denying plaintiffs free access to the market for the reconditioning and sale of used Kodak micrographic and photocopy equipment;

(b) Denying plaintiffs free access to the market for the repair and service of Kodak micrographic and photocopy equipment;

(c) Denying the public free choice in the markets for reconditioned and used Kodak micrographic and photocopy equipment, and for the repair and service of such equipment;

(d) Impacting a substantial amount of commerce both in the reconditioning and sale of used Kodak micrographic and photocopy equipment, and in the repair and service of such equipment; and,

(e) Substantially lessening competition and tending to create a monopoly in the sale of used Kodak micrographic and photocopy equipment, and in the parts, repair and service of such equipment.

Prayer for Relief

WHEREFORE, as and for a First Claim for Relief plaintiffs pray this court to order, adjudge and decree that:

A. Defendant Kodak has violated Section 1 of the Sherman Act and Section 3 of the Clayton Act.

B. Plaintiffs be awarded damages, and that defendant Kodak pay plaintiffs threefold the damages awarded;

C. Plaintiffs be awarded reasonable attorneys fees;

D. Plaintiffs recover interest on actual damages;

E. Plaintiffs recover costs of suit; and

F. Plaintiffs be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

SECOND CLAIM FOR RELIEF
(All Plaintiffs)

(Monopolization – Sherman Act § 2)

Jurisdiction and Venue

62. The jurisdiction of this court is invoked and this action is instituted under the provisions of Section 1337 of Title 28, United States Code (28 U.S.C. § 1337) and Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26) to declare, to prevent and restrain and to recover damages sustained by plaintiffs as a result of violations of Section 2 of the Sherman Act (15 U.S.C. § 2).

63. Plaintiffs incorporate herein by reference the allegations of paragraph 2 of the First Claim for Relief, with the same force and effect as if said paragraph were herein set forth in full.

Description of Plaintiffs

64. Plaintiffs incorporate herein by reference the allegations of paragraphs 3 through 23 inclusive of the First Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

Description of Defendant

65. Plaintiffs incorporate herein by reference the allegations of paragraphs 24 and 25 of the First Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

Nature of Trade and Commerce

66. Plaintiffs incorporate herein by reference the allegations of paragraphs 26 through 37 inclusive of the Fist Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

Unlawful Acts of Defendant

67. Plaintiffs incorporate herein by reference the allegations of paragraphs 38 through 59 inclusive of the First Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

68. The aforesaid conduct and acts of Kodak were engaged in by Kodak with the purpose and intent: (1) to injure, suppress, destroy and irreparably harm plaintiffs and others as vital competitors in the relevant markets; (2) to integrate vertically and to monopolize the reconditioned and used Kodak micrographic and photocopy

equipment market; (3) to monopolize the service market for Kodak micrographic and photocopy equipment; (4) to leverage into said reconditioned and used equipment market as well as the service market; (5) to control prices; and, (6) unlawfully to monopolize trade and commerce in said relevant markets in violation of Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act.

Injury

69. By reason of Kodak's aforesaid unlawful conduct and as a direct and proximate result of such conduct, plaintiffs have lost sales, profits and value of their businesses. Plaintiffs have suffered, and will continue to suffer irreparable harm through loss of their trade and business, and the public will be damaged by: (1) the elimination of plaintiffs and others in the sales, repair and service of Kodak micrographic and photocopy equipment in the relevant markets; (2) the elimination of independent sources for Kodak micrographic and photocopy equipment parts in the relevant markets; and, (3) the elimination of suppliers of and the supply of used and reconditioned Kodak micrographic and photocopy equipment in the relevant markets.

70. The aforesaid violations of Section 2 of the Sherman Act have had, will have, and will continue to have the following effects, among others:

(a) Defendant Kodak has achieved and maintained a monopoly in the repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and in the sales thereof in the relevant markets;

(b) Defendant Kodak has restrained, suppressed and eliminated actual and potential competition in the repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and in the sales thereof in the relevant markets;

(c) The public has been denied the benefits of unrestricted competition in a free and open market in the maintenance, repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and in the sales thereof in the relevant markets;

(d) Plaintiffs have been denied the benefits of unrestricted competition in a free and open market for the maintenance, repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and in the sales thereof in the relevant markets; and,

(e) Plaintiffs have been precluded from obtaining and carrying out substantial contracts entered into for the maintenance, repair and service of Kodak micrographic and photocopy equipment and related accessories, for the parts therefor, and for the sale thereof in the relevant markets.

Prayer for Relief

WHEREFORE, as and for a Second Claim for Relief, plaintiffs pray this court to order, adjudge and decree that:

A. Defendant Kodak has engaged in monopolization of the relevant markets in violation of Section 2 of the Sherman Act;

B. Plaintiffs be awarded damages, when ascertained, and that defendant Kodak pay plaintiffs threefold the damages;

C. Plaintiffs be awarded reasonable attorneys' fees;

D. Plaintiffs recover interest on actual damages;

E. Plaintiffs recover costs of suit; and,

F. Plaintiffs be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

THIRD CLAIM FOR RELIEF
(All Plaintiffs)

(Attempt to Monopolize – Sherman Act Section 2)

Jurisdiction and Venue

71. The jurisdiction of this court is invoked and this action is instituted under the provisions of Section 1337 of Title 28, United States Code (28 U.S.C. § 1337) and Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26) to declare, to prevent and restrain and recover damages sustained by plaintiffs as a result of violations of Section 2 of the Sherman Act (15 U.S.C. § 2).

72. Plaintiffs incorporate herein by reference the allegations of paragraph 2 of the First Claim for Relief, with the same force and effect as if said paragraph were herein set forth in full.

Description of Plaintiffs

73. Plaintiffs incorporate herein by reference the allegations of paragraphs 3 through 23 inclusive of the First Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

Description of Defendant

74. Plaintiffs incorporate herein by reference the allegations of paragraphs 24 and 25 of the First Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

Nature of Trade and Commerce

75. Plaintiffs incorporate herein by reference the allegations of paragraphs 26 through 37 inclusive of the First Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

Unlawful Acts

76. Plaintiffs incorporate herein by reference the allegations of paragraphs 38 through 59 inclusive of the First Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

77. The aforesaid conduct and acts of Kodak were engaged in by Kodak with the purpose and intent to injure, suppress, destroy and irreparably harm plaintiffs as vital competitors in the relevant market; and, to control prices and to unlawfully monopolize trade and commerce in said relevant markets in violation of Section 2 of

the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act. Said conduct and acts of Kodak has created and creates a dangerous probability that Kodak will succeed in injuring, suppressing, destroying and irreparably harming plaintiffs as vital competitors in the relevant markets and will allow Kodak to control prices and monopolize trade and commerce in said relevant markets.

Injury

78. By reason of Kodak's aforesaid unlawful conduct and as a direct and proximate result of such conduct, plaintiffs have lost sales, profits and value of their businesses. Plaintiffs have, and will continue to suffer irreparable harm through loss of their trade and business, and the public will be damaged by: (1) the weakening or elimination of plaintiffs and others in the repair and service of Kodak micrographic and photocopy equipment in the relevant markets; (2) the weakening or elimination of independent sources for parts for Kodak micrographic and photocopy equipment; and, (3) the weakening or elimination of suppliers of and the supply of used and reconditioned Kodak micrographic and photocopy equipment.

79. The foresaid violations of Section 2 of the Sherman Act have had, will have, and will continue to have the following effects, among others:

(a) There will be a dangerous probability that defendant Kodak will achieve a monopoly in the repair and service of Kodak micrographic and photocopy equipment, in the

parts therefor, and in the sales thereof in the relevant markets;

(b) Defendant Kodak has and will restrain, suppress and eliminate actual and potential competition in the repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and in the sales thereof in the relevant markets;

(c) The public has been and will be denied the benefits of unrestricted competition in a free and open market in the repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and, in the sales thereof in the relevant markets;

(d) Plaintiffs have been and will be denied the benefits of unrestricted competition in a free and open market for the repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and, in the sales thereof in the relevant markets; and,

(e) Plaintiffs have been and will be precluded from obtaining and carrying out substantial contracts entered into for the repair and service of Kodak micrographic and photocopy equipment and related accessories, for the parts therefor, and for the sale thereof in the relevant markets.

Prayer for Relief

WHEREFORE, as and for a Third Claim for Relief, plaintiffs pray this court to order, adjudge and decree that:

A. Defendant Kodak has attempted to monopolize the relevant markets in violation of Section 2 of the Sherman Act;

B. Plaintiffs be awarded damages, when ascertained, and that defendant Kodak pay plaintiffs threefold the damages;

C. Plaintiffs be awarded reasonable attorneys' fees;

D. Plaintiffs recover interest on actual damages;

E. Plaintiffs recover costs of suit; and,

F. Plaintiffs be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

FOURTH CLAIM FOR RELIEF
(All Plaintiffs)

(Combination, Contracts, Conspiracies in Restraint of Trade; Combination and Conspiracy to Monopolize – Sherman Act Sections 1 and 2)

Jurisdiction and Venue

80. The jurisdiction of this court is invoked and this action is instituted under the provisions of Section 1337 of Title 28, United States Code (28 U.S.C. § 1337) and Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26) to declare, to prevent and restrain and recover damages sustained by plaintiffs as a result of violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

81. Plaintiffs incorporate herein by reference the allegations of paragraph 2 of the First Claim for Relief, with the same force and effect as if said paragraph were herein set forth in full.

Description of Plaintiffs

82. Plaintiffs incorporate herein by reference the allegations of paragraphs 3 through 23 inclusive of the First Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

Description of Defendant

83. Plaintiffs incorporate herein by reference the allegations of paragraphs 24 and 25 of the First Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

Nature of Trade and Commerce

84. Plaintiffs incorporate herein by reference the allegations of paragraphs 26 through 37 inclusive of the First Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

Unlawful Acts

85. Plaintiffs incorporate herein by reference the allegations of paragraphs 38 through 59, inclusive of the First Claim for Relief, with the same force and effect as if said paragraphs were set forth in full.

86. The aforesaid conduct and acts of Kodak and others in contract, combination and conspiracy with Kodak unreasonably restrained trade in the relevant markets and were done with purpose and intent to control prices and to unlawfully monopolize trade and commerce in said relevant markets in violation of Sections 1 and 2 of

the Act of Congress of July 2, 1890 (15 U.S.C. §§ 1 and 2), commonly known as the Sherman Act.

Injury

87. By reason of Kodak's aforesaid unlawful conduct and as a direct and proximate result of such conduct, plaintiffs have lost sales, profits and value of their businesses. Plaintiffs have, and will continue to suffer irreparable harm through loss of their trade and business, and the public will be damaged by: (1) the weakening or elimination of plaintiffs and others in the maintenance, repair and service of Kodak micrographic and photocopy equipment in the relevant markets; (2) the weakening or elimination of independent sources for parts to Kodak micrographic and photocopy equipment; and, (3) the weakening or elimination of suppliers of and the supply of used and reconditioned Kodak micrographic and photocopy equipment.

88. The foresaid violations of Sections 1 and 2 of the Sherman Act have had, will have, and will continue to have the following effects, among others:

(a) Defendant Kodak has achieved and maintained a monopoly in the repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and in the sales thereof in the relevant markets;

(b) Defendant Kodak has restrained, suppressed and eliminated actual and potential competition in the repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and in the sales thereof in the relevant markets;

(c) The public has been denied the benefits of unrestricted competition in a free and open market in the repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and in the sales thereof in the relevant markets;

(d) Plaintiffs have been denied the benefits of unrestricted competition in a free and open market for the repair and service of Kodak micrographic and photocopy equipment, in the parts therefor, and, in the sales thereof in the relevant markets; and,

(e) Plaintiffs have been precluded from obtaining and carrying out substantial contracts entered into for the repair and service of Kodak micrographic and photocopy equipment and related accessories, for the parts therefor, and for the sale thereof in the relevant markets.

Prayer for Relief

WHEREFORE, as and for a Fourth Claim for Relief, plaintiffs pray this court to order, adjudge and decree that:

A. Defendant Kodak has engaged in unreasonable contracts, combinations and conspiracies in restraint of trade in the relevant markets and has unreasonably combined and conspired to monopolize trade in the relevant markets in violation of Sections 1 and 2 of the Sherman Act;

B. Plaintiffs be awarded damages, when ascertained, and that defendant pay plaintiffs threefold the damages;

C. Plaintiffs be awarded reasonable attorneys' fees;

D. Plaintiffs recover interest on actual damages;

E. Plaintiffs recover costs of suit; and,

F. Plaintiffs be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

FIFTH CLAIM FOR RELIEF

(As to Plaintiffs ITS, Omni, G&S and CPO)

(California Unfair Competition Laws – Cal.Bus. & Prof.Code §§ 16700-16760, 17000-17101, 17200-17208)

Jurisdiction and Venue

89. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of the First, Second, Third and Fourth Claims For Relief and therefore falls within the pendent jurisdiction of this court.

Claim

90. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 3, 9, and 19 through 61, inclusive, of the First Claim for Relief; paragraphs 68 through 70 inclusive, of the Second Claim for Relief;

paragraphs 77 through 79 inclusive, of the Third Claim for Relief; and paragraphs 86 through 88 inclusive, of the Fourth Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

91. Kodak has offices in and is qualified to do business in California. Kodak does a substantial amount of business in California, including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Kodak has therefore voluntarily chosen to be subject to the laws of California. The aforesaid acts and practices of Kodak occurred in California, were intended to injure, and as a foreseeable and direct consequence injured plaintiffs ITS, Omni, G&S and CPO in their trade and business in California. Plaintiffs are citizens of California, and California has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

92. The aforesaid acts and practices of Kodak violate the California Cartwright Act (California Business and Professions Code §§ 16700-16760), the California Unfair Practices Act (California Business and Professions Code §§ 17000-17101) and the California Unfair Competition Act (California Business and Professions Code §§ 17200-17208).

Prayer for Relief

WHEREFORE, as and for a Fifth Claim for Relief, plaintiffs ITS, Omni, G&S and CPO pray this court to order, adjudge and decree that:

A. Defendant Kodak has violated the aforesaid California laws;

B. Plaintiffs be awarded damages, when ascertained, and that defendant Kodak pay plaintiffs threefold the damages;

C. Plaintiffs be awarded reasonable attorneys' fees;

D. Plaintiffs recover interest on actual damages;

E. Plaintiffs recover costs of suit; and,

F. Plaintiffs be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

SIXTH CLAIM FOR RELIEF
(As to Plaintiffs J-E-S-P and Data Prox)

(New Jersey Statutes Annotated §§ 56:9-1 et seq.)

Jurisdiction and Venue

93. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of the First, Second, Third and Fourth Claims For Relief and therefore falls within the pendent jurisdiction of this court.

Claim

94. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 2, 4, 14 and 21 through 61, inclusive, of the First Claim for Relief; paragraphs 68 through 70 inclusive, of the Second Claim for Relief; paragraphs 77 through 79 inclusive, of the Third Claim for Relief; and paragraphs 86 through 88 inclusive, of the Fourth Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

95. Kodak has offices in and is qualified to do business in New Jersey. Kodak does a substantial amount of business in New Jersey, including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Kodak has therefore voluntarily chosen to be subject to the laws of New Jersey. The aforesaid acts and practices of Kodak occurred in New Jersey, were intended to injure, and as a foreseeable and direct consequence injured plaintiffs J-E-S-P and Data Prox in their trade and business in New Jersey. Plaintiffs are citizens of New Jersey, and New Jersey has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

96. The aforesaid acts and practices of Kodak violate the New Jersey Antitrust Act (New Jersey Statutes Annotated §§ 56:9-1 et seq.)

Prayer for Relief

WHEREFORE, as and for a Sixth Claim for Relief, plaintiffs J-E-S-P and Data Prox pray this court to order, adjudge and decree that:

A. Defendant Kodak has violated the aforesaid New Jersey laws;

B. Plaintiffs be awarded damages, when ascertained, and that defendant Kodak pay plaintiffs threefold the damages;

C. Plaintiffs be awarded reasonable attorneys' fees;

D. Plaintiffs recover interest on actual damages;

E. Plaintiffs recover costs of suit; and,

F. Plaintiffs be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

SEVENTH CLAIM FOR RELIEF

(As to Plaintiffs Micrographic Services, Ingle and Fisher)

(Missouri Revised Statutes, § 416.001 et seq.)

Jurisdiction and Venue

97. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of the First, Second, Third and Fourth Claims For Relief and therefore falls within the pendent jurisdiction of this court.

Claim

98. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 2, 13, 15, and 21 through 61, inclusive, of the First Claim for Relief; paragraphs 68 through 70 inclusive, of the Second Claim for Relief; paragraphs 77 through 79 inclusive, of the Third Claim for Relief; and paragraphs 86 through 88 inclusive, of the Fourth Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

99. Kodak has offices in and is qualified to do business in Missouri. Kodak does a substantial amount of business in Missouri, including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Kodak has therefore voluntarily chosen to be subject to the laws of Missouri. The aforesaid acts and practices of Kodak occurred in Missouri, were intended to injure, and as a foreseeable and direct consequence injured plaintiffs Micrographic Services, Ingle and Fisher in their trade and business in Missouri. Plaintiffs are citizens of Missouri, and Missouri has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

100. The aforesaid acts and practices of Kodak violate the Missouri Antitrust Law (Missouri Revised Statutes § 416.010 et seq.)

Prayer for Relief

WHEREFORE, as and for a Seventh Claim for Relief, plaintiffs Micrographic Services, Ingle and Fisher pray this court to order, adjudge and decree that:

A. Defendant Kodak has violated the aforesaid Missouri law;

B. Plaintiffs be awarded damages, when ascertained, and that defendant Kodak pay plaintiffs threefold the damages;

C. Plaintiffs be awarded reasonable attorneys' fees;

D. Plaintiffs recover interest on actual damages;

E. Plaintiffs recover costs of suit; and,

F. Plaintiffs be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

EIGHTH CLAIM FOR RELIEF
(As to Plaintiffs Amtec and Midwest)

(Minnesota Statutes §§ 325D.01, et seq.; 325D.09 et seq.; and, 325D.49 et seq.)

Jurisdiction and Venue

101. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of the First, Second, Third and Fourth Claims For Relief and therefore falls within the pendent jurisdiction of this court.

Claim

102. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 2, 10, 18, and 21 through 61, inclusive, of the First Claim for Relief; paragraphs 68 through 70 inclusive, of the Second Claim for Relief; paragraphs 77 through 79 inclusive, of the Third Claim for Relief; and paragraphs 86 through 88 inclusive, of the Fourth Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

103. Kodak has offices in and is qualified to do business in Minnesota. Kodak does a substantial amount of business in Minnesota, including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Kodak has therefore voluntarily chosen to be subject to the laws of Minnesota. The aforesaid acts and practices of Kodak occurred in Minnesota, were intended to injure, and as a foreseeable and direct consequence injured plaintiffs Amtec and Midwest in their trade and business in Minnesota. Plaintiffs are citizens of Minnesota, and Minnesota has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

104. The aforesaid acts and practices of Kodak violate the Minnesota Antitrust Law of 1971 (Minnesota Statutes §§ 325D.49 et seq.) the Minnesota act against Unfair Discrimination and Competition (Minnesota Statutes §§ 325D.01 – 325D.08) and the Minnesota Unlawful Trade Practices Act (Minnesota Statutes §§ 325D.09 – 325D.16).

Prayer for Relief

WHEREFORE, as and for an Eighth Claim for Relief, plaintiffs Amtec and Midwest pray this court to order, adjudge and decree that:

A. Defendant Kodak has violated the aforesaid Minnesota laws;

B. Plaintiffs be awarded damages, when ascertained, and that defendant Kodak pay plaintiffs threefold the damages;

C. Plaintiffs be awarded reasonable attorneys' fees;

D. Plaintiffs recover interest on actual damages;

E. Plaintiffs recover costs of suit; and,

F. Plaintiffs be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

NINTH CLAIM FOR RELIEF
(As to Plaintiffs Advanced and BCS)

(Colorado Revised Statutes §§ 6-1-101 through 6-1-114; 6-2-101 through 6-2-117; and 6-4-101 through 6-4-109)

Jurisdiction and Venue

105. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This claim also arises out of the facts previously alleged in support

of the First, Second, Third and Fourth Claims For Relief and therefore falls within the pendent jurisdiction of this court.

Claim

106. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 2, 11 through 12 and 21 through 61, inclusive, of the First Claim for Relief; paragraphs 68 through 70 inclusive, of the Second Claim for Relief; paragraphs 77 through 79 inclusive, of the Third Claim for Relief; and paragraphs 86 through 88 inclusive, of the Fourth Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

107. Kodak has offices in and is qualified to do business in Colorado. Kodak does a substantial amount of business in Colorado, including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Kodak has therefore voluntarily chosen to be subject to the laws of Colorado. The aforesaid acts and practices of Kodak occurred in Colorado, were intended to injure, and as a foreseeable and direct consequence injured plaintiffs Advanced and BCS in their trade and business in Colorado. Plaintiffs are citizens of Colorado, and Colorado has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

108. The aforesaid acts and practices of Kodak violate the Colorado Consumer Protection Act (Colorado Revised Statutes §§ 6-1-101 through 6-1-114); the Colorado Unfair Practices Act (Colorado Revised Statutes

§§ 6-2-101 through 6-2-117) and the Colorado Fair Trade Act (Colorado Revised Statutes 6-4-101 through 6-4-109).

Prayer for Relief

WHEREFORE, as and for a Ninth Claim for Relief, plaintiffs Advanced and BCS pray this court to order, adjudge and decree that:

A. Defendant Kodak has violated the aforesaid Colorado Acts;

B. Plaintiffs be awarded damages, when ascertained, and that defendant Kodak pay plaintiffs threefold the damages;

C. Plaintiffs be awarded reasonable attorneys' fees;

D. Plaintiffs recover interest on actual damages;

E. Plaintiffs recover costs of suit; and,

F. Plaintiffs be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

TENTH CLAIM FOR RELIEF
(As to Plaintiff Shields)

(Pennsylvania Unfair Sales Act – 73 Pennsylvania Statutes Annotated § 211 et seq.)

Jurisdiction and Venue

109. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C.

§§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of the First, Second, Third and Fourth Claims For Relief and therefore falls within the pendent jurisdiction of this court.

Claim

110. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 2, 5 and 21 through 61, inclusive, of the First Claim for Relief; paragraphs 68 through 70 inclusive, of the Second Claim for Relief; paragraphs 77 through 79 inclusive, of the Third Claim for Relief; and paragraphs 86 through 88 inclusive, of the Fourth Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

111. Kodak has offices in and is qualified to do business in Pennsylvania. Kodak does a substantial amount of business in Pennsylvania, including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Kodak has therefore voluntarily chosen to be subject to the laws of Pennsylvania. The aforesaid acts and practices of Kodak occurred in Pennsylvania, were intended to injure, and as a foreseeable and direct consequence injured plaintiff Shields in its trade and business in Pennsylvania. Plaintiff is a citizen of Pennsylvania, and Pennsylvania has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

112. The aforesaid acts and practices of Kodak violate the Pennsylvania Unfair Sales Act (73 Pennsylvania Statutes Annotated § 211 et seq.).

Prayer for Relief

WHEREFORE, as and for a Tenth Claim for Relief, plaintiff Shields prays this court to order, adjudge and decree that:

A. Defendant Kodak has violated the aforementioned Pennsylvania laws;

B. Plaintiff be awarded damages, when ascertained;

C. Plaintiff be awarded reasonable attorneys' fees;

D. Plaintiff recover interest on actual damages;

E. Plaintiff recover costs of suit; and,

F. Plaintiff be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

ELEVENTH CLAIM FOR RELIEF
(As to Plaintiff Micro Maintenance)
(Illinois Revised Statutes § 60-1 et seq.)
Jurisdiction and Venue

113. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value

of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of the First, Second, Third and Fourth Claims For Relief and therefore falls within the pendent jurisdiction of this court.

Claim

114. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 2, 7, and 21 through 61, inclusive, of the First Claim for Relief; paragraphs 68 through 70 inclusive, of the Second Claim for Relief; paragraphs 77 through 79 inclusive, of the Third Claim for Relief; and paragraphs 86 through 88 inclusive, of the Fourth Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

115. Kodak has offices in and is qualified to do business in Illinois. Kodak does a substantial amount of business in Illinois, including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Kodak has therefore voluntarily chosen to be subject to the laws of Illinois. The aforesaid acts and practices of Kodak occurred in Illinois, were intended to injure, and as a foreseeable and direct consequence injured plaintiff Micro Maintenance in its trade and business in Illinois. Plaintiff is a citizen of Illinois, and Illinois has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

116. The aforesaid acts and practices of Kodak violate the Illinois Antitrust Act (Illinois Revised Statutes § 60-1 et seq.)

Prayer for Relief

WHEREFORE, as and for a Eleventh Claim for Relief, plaintiff Micro Maintenance prays this court to order, adjudge and decree that:

A. Defendant Kodak has violated the aforesaid Illinois act;

B. Plaintiff be awarded damages, when ascertained, and that defendant Kodak pay plaintiff threefold the damages;

C. Plaintiff be awarded reasonable attorneys' fees;

D. Plaintiff recover interest on actual damages;

E. Plaintiff recover costs of suit; and,

F. Plaintiff be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

TWELFTH CLAIM FOR RELIEF
(As to Plaintiff Atlanta General)
(Georgia Code Annotated § 20-504)
Jurisdiction and Venue

117. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of the First, Second, Third and Fourth Claims For Relief and

therefore falls within the pendent jurisdiction of this court.

Claim

118. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 2, 8 and 21 through 61, inclusive, of the First Claim for Relief; paragraphs 68 through 70 inclusive, of the Second Claim for Relief; paragraphs 77 through 79 inclusive, of the Third Claim for Relief; and paragraphs 86 through 88 inclusive, of the Fourth Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

119. Kodak has offices in and is qualified to do business in Georgia. Kodak does a substantial amount of business in Georgia, including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Kodak has therefore voluntarily chosen to be subject to the laws of Georgia. The aforesaid acts and practices of Kodak occurred in Georgia, were intended to injure, and as a foreseeable and direct consequence injured plaintiff Atlanta General in its trade and business in Georgia. Plaintiff is a citizen of Georgia, and Georgia has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

120. The aforesaid acts and practices of Kodak violate the unfair competition provisions of Georgia law (Georgia Code Annotated § 20-504).

Prayer for Relief

WHEREFORE, as and for a Twelfth Claim for Relief, plaintiff Atlanta General prays this court to order, adjudge and decree that:

A. Defendant Kodak has violated the aforesaid Georgia law;

B. Plaintiff be awarded damages, when ascertained;

C. Plaintiff be awarded reasonable attorneys' fees;

D. Plaintiff recover interest on actual damages;

E. Plaintiff recover costs of suit; and,

F. Plaintiff be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

THIRTEENTH CLAIM FOR RELIEF
(As to Plaintiff IOA)

(New York General Business Law §§ 340 et seq.)

Jurisdiction and Venue

121. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of the First, Second, Third and Fourth Claims For Relief and therefore falls within the pendent jurisdiction of this court.

Claim

122. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 2, 16 and 21 through 61, inclusive, of the First Claim for Relief; paragraphs 68 through 70 inclusive, of the Second Claim for Relief; paragraphs 77 through 79 inclusive, of the Third Claim for Relief; and paragraphs 86 through 88 inclusive, of the Fourth Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

123. Kodak has offices in and is qualified to do business in New York. Kodak does a substantial amount of business in New York, including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Kodak has therefore voluntarily chosen to be subject to the laws of New York. The aforesaid acts and practices of Kodak occurred in New York, were intended in injure, and as a foreseeable and direct consequence injured plaintiff IOA in its trade and business in New York. Plaintiff is a citizen of New York, and New York has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

124. The aforesaid acts and practices of Kodak violate the New York unfair competition laws. (New York General Business Law § 340 et seq.)

Prayer for Relief

WHEREFORE, as and for a Thirteenth Claim for Relief, plaintiff IOA prays this court to order, adjudge and decree that:

A. Defendant Kodak has violated the aforesaid New York law;

B. Plaintiff be awarded damages, when ascertained, and that defendant Kodak pay plaintiff threefold the damages;

C. Plaintiff be awarded reasonable attorneys' fees;

D. Plaintiff recover interest on actual damages;

E. Plaintiff recover costs of suit; and,

F. Plaintiff be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

FOURTEENTH CLAIM FOR RELIEF
(As To Plaintiff Searle)

(Texas Business and Commerce Code §§ 1501 et seq. and 17.41 et seq.)

Jurisdiction and Venue

125. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of the First, Second, Third and Fourth Claims For Relief and therefore falls within the pendent jurisdiction of this court.

Claim

126. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 2, 17 and 21 through 61, inclusive, of the First Claim for Relief; paragraphs 68 through 70 inclusive, of the Second Claim for Relief; paragraphs 77 through 79 inclusive, of the Third Claim for Relief; and paragraphs 86 through 88 inclusive, of the Fourth Claim for Relief, with the same force and effect as if said paragraph were herein set forth in full.

127. Kodak has offices in and is qualified to do business in Texas. Kodak does a substantial amount of business in Texas, including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Kodak has therefore voluntarily chosen to be subject to the laws of Texas. The aforesaid acts and practices of Kodak occurred in Texas, were intended to injure, and as a foreseeable and direct consequence injured plaintiff Searle in its trade and business in Texas. Plaintiff is a citizen of Texas, and Texas has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

128. The aforesaid acts and practices of Kodak violate the Texas Free Enterprise and Antitrust Act of 1983 (Texas Business and Commerce Code § 15.01 et seq.), and The Texas Deceptive Trade Practices Act (Texas Business and Commercial Code § 17.41 et seq.)

Prayer for Relief

WHEREFORE, as and for a Fourteenth Claim for Relief, plaintiff Searle prays this court to order, adjudge and decree that:

A. Defendant Kodak has violated the aforesaid Texas laws;

B. Plaintiff be awarded damages, when ascertained, and that defendant Kodak pay plaintiff threefold the damages;

C. Plaintiff be awarded reasonable attorneys' fees;

D. Plaintiff recover interest on actual damages;

E. Plaintiff recover costs of suit; and,

F. Plaintiff be awarded injunctive relief to prevent and restrain defendant Kodak's unlawful actions and for such other and further relief as the court may deem just and proper.

FIFTEENTH CLAIM FOR RELIEF
(All Plaintiffs)

(Breach of Contract, Breach of Covenant of Good Faith)

Jurisdiction and Venue

129. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of the First, Second, Third and Fourth Claims For Relief and therefore falls within the pendent jurisdiction of this court.

Claim

130. This claim is brought to recover damages sustained by plaintiffs as a result of breach of contract and of the covenant of good faith and fair dealing by defendant Kodak.

131. Plaintiffs incorporate herein by reference the allegations in paragraphs 2 through 61 inclusive of the First Claim for Relief; paragraphs 68 through 70 inclusive of the Second Claim for Relief; paragraphs 77 through 79 inclusive of the Third Claim for Relief; and, paragraphs 86 through 88 inclusive of the Fourth Claim for Relief, with the same force and effect as if said paragraphs were herein set forth in full.

132. Defendant Kodak has offices in and is qualified to do business in each of the states in which plaintiffs is incorporated and in which each has its principal place of business. Defendant Kodak does a substantial amount of business in each of these states including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Defendant has therefore voluntarily chosen to be subject to the laws of each of said states. Defendant Kodak, as hereinafter set forth, has intentionally breached its contractual relationships with plaintiffs and breached its covenant of good faith and fair dealing to plaintiffs and has thereby injured plaintiffs in each of said states. Since plaintiffs are citizens of each of said states, operating primarily in said states, each state has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

133. Plaintiffs contracted with defendant Kodak under written agreements of sale providing in relevant parts that Kodak would sell replacement parts to any party who intended to use them to repair Kodak equipment, and that Kodak would act in a fair and appropriate manner in discontinuing shipments of parts to any of its customers and revoking or modifying any of the terms of sale between plaintiffs and defendant Kodak.

134. Implied in the agreements between plaintiffs and Kodak was a covenant by defendant Kodak that it would act in good faith and deal fairly with plaintiffs and that Kodak would do nothing to interfere with the rights of plaintiffs to receive the benefits of the contract.

135. Defendant Kodak, in breach of its covenant of good faith and fair dealing, intentionally, maliciously, and oppressively refused and failed to sell parts for Kodak micrographic and photocopy equipment to plaintiffs, which parts were intended for the repair of Kodak equipment, or to exercise fair and appropriate judgment in revoking or modifying the terms of the sale and allocating distribution of said parts.

136. Plaintiffs have been damaged in an amount not presently ascertainable, and when said amount is ascertained plaintiffs will ask leave of court to amend this Complaint by inserting said sum herein.

137. The aforementioned breach of the covenant of good faith and fair dealing was done willfully and maliciously and with intent to injure and oppress plaintiffs and to damage the ability of plaintiffs to compete for customers with defendant Kodak and to put plaintiffs out of business and, by reason thereof, plaintiffs are entitled

to exemplary and punitive damages in the sum of ONE HUNDRED MILLION DOLLARS ($100,000,000.00).

Prayer for Relief

WHEREFORE, as and for a Fifteenth Claim for Relief, plaintiffs pray this Court to order, adjudge and decree that:

A. Defendant Kodak has breached its contract with plaintiffs and the implied covenant of good faith and fair dealing to plaintiffs;

B. Plaintiffs be awarded compensating damages in an amount to be ascertained;

C. Plaintiffs be awarded exemplary and punitive damages in the sum of ONE HUNDRED MILLION DOLLARS ($100,000,000.00);

D. Plaintiffs recover costs of suit; and,

E. Plaintiffs be awarded such other and further relief as the Court may deem just and proper.

SIXTEENTH CLAIM FOR RELIEF
(All Plaintiffs)

(Interference With Contracts and Prospective Economic Advantage)

Jurisdiction and Venue

138. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331 and 1337) and the doctrine of pendent jurisdiction. The matter in controversy exceeds the sum or value

of $10,000.00, exclusive of interest and costs. This claim arises out of the facts previously alleged in support of plaintiffs' First, Second, Third, and Fourth Claims for Relief and therefore falls within the pendent jurisdiction of this court.

Claim

139. This action is brought to declare, to prevent and restrain, and to recover damages sustained by plaintiffs as a result of defendant's intentional conduct interfering with their existing contractual relationships and interfering with their prospective economic advantage.

140. Plaintiffs incorporate herein by reference the allegations in paragraphs 2 through 61 inclusive of the First Claim for Relief; paragraphs 68 through 70 inclusive of the Second Claim for Relief; paragraphs 77 through 79 inclusive of the Third Claim for Relief; and, paragraphs 86 through 88 inclusive of the Fourth Claim for Relief, with the same force and effect as though said paragraphs were herein set forth in full.

141. Defendant Kodak has offices in and is qualified to do business in each of the states in which plaintiffs is incorporated and in which each has its principal place of business. Defendant Kodak does a substantial amount of business in each of these states including substantial sales and a substantial amount of repair and service of Kodak micrographic and photocopy equipment. Defendant has therefore voluntarily chosen to be subject to the laws of each of said states. Defendant Kodak, as hereinafter set

forth, has intentionally interfered with plaintiffs' contractual relationships and interfered with plaintiffs' prospective economic advantage and has thereby injured plaintiffs in each of said states. Since plaintiffs are citizens of each of said states, operating primarily in said states, each state has an interest in the application of its laws to this controversy and there is no compelling reason for not applying said laws.

142. Defendant Kodak has engaged in the following intentional conduct with the purpose and effect of interfering with plaintiffs' existing contractual relationships and to interfere with plaintiffs' prospective economic advantage. These acts of Kodak include, but are not limited to:

A. Plaintiffs had existing contracts and potential economic relationships between themselves and numerous owners and users of Kodak micrographic and photocopy equipment. Defendant Kodak knew of the existence of these contracts and economic relationships. Defendant Kodak has disrupted the contracts and potential economic advantage of plaintiffs through the acts and policies of preventing plaintiffs from obtaining parts, of preventing repair and service on Kodak equipment and of otherwise foreclosing plaintiffs from the sale, repair and service of Kodak equipment.

B. Kodak has attempted through the acts and representations set forth herein to put plaintiffs out of business.

143. As a proximate result of the acts of defendant Kodak, plaintiffs have been damaged as hereinafter alleged.

144. Plaintiffs have been damaged in an amount not presently ascertainable, and when said amount is ascertained plaintiffs will ask leave of court to amend this Complaint by inserting said sum herein.

145. The aforementioned acts of defendant Kodak were done willfully and maliciously and with intent to injure and oppress plaintiffs with the intent of driving plaintiffs out of business and, by reason thereof, plaintiffs are entitled to exemplary and punitive damages in the sum of ONE HUNDRED MILLION DOLLARS ($100,000,000.00).

146. Against the continuing violations of defendant Kodak, plaintiffs have no adequate remedy at law and defendant Kodak should be enjoined from further interference with the contractual relationships and prospective economic advantages of plaintiffs as hereinabove alleged.

Prayer for Relief

WHEREFORE, as and for a Sixteenth Claim For Relief, plaintiffs pray this Court to order, adjudge and decree that:

A. Defendant Kodak has violated plaintiffs' common law right to be free from intentional interference with its contractual relationships and intentional interference with its prospective economic advantage;

B. Plaintiffs be awarded damages, in an amount to be ascertained;

C. Plaintiffs be awarded exemplary and punitive damages in the sum of ONE HUNDRED MILLION DOLLARS ($100,000,000.00);

D. Plaintiffs recover costs of suit; and,

E. Plaintiffs be awarded such other and further relief as the court may deem just and proper.

Dated: April 14, 1987

LAW OFFICES OF
JAMES A. HENNEFER

By: /s/ James A. Hennefer
James A. Hennefer
Attorneys for Plaintiffs

Plaintiffs demand a trial by jury.

Dated: April 14, 1987

LAW OFFICES OF
JAMES A. HENNEFER

By: /s/ James A. Hennefer
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, v. EASTMAN KODAK COMPANY, Defendant.	No. C 87 1686 WWS ANSWER OF DEFENDANT EASTMAN KODAK CO. TO COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

Defendant Eastman Kodak Company ("Kodak") answers plaintiffs' Complaint for Damages and Injunctive Relief (the "Complaint") as follows:

1. Kodak denies each and every allegation contained in paragraph 1 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 1 of the Complaint.

2. Kodak denies each and every allegation contained in paragraph 2 of the Complaint, except to admit that Kodak is qualified to do business, does substantial

business, and maintains offices within the Northern District of California.

3. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint, and on that basis, denies such allegations.

4. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint, and on that basis, denies such allegations.

5. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint, and on that basis, denies such allegations.

6. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint, and on that basis, denies such allegations.

7. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint, and on that basis, denies such allegations.

8. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint, and on that basis, denies such allegations.

9. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the Complaint, and on that basis, denies such allegations.

10. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the Complaint, and on that basis, denies such allegations.

11. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the Complaint, and on that basis, denies such allegations.

12. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the Complaint, and on that basis, denies such allegations.

13. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the Complaint, and on that basis, denies such allegations.

14. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the Complaint, and on that basis, denies such allegations.

15. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the Complaint, and on that basis, denies such allegations.

16. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Complaint, and on that basis, denies such allegations.

17. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations

contained in paragraph 17 of the Complaint, and on that basis, denies such allegations.

18. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint, and on that basis, denies such allegations.

19. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 of the Complaint, and on that basis, denies such allegations.

20. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the Complaint, and on that basis, denies such allegations.

21. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the Complaint, and on that basis, denies such allegations.

22. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Complaint, and on that basis, denies such allegations.

23. Kodak denies each and every allegation contained in paragraph 23 of the Complaint, except to allege that it can neither admit nor deny plaintiffs' allegations concerning the manufacture and distribution of "[m]ost parts for Kodak micrographic and photocopy equipment" because that phrase may be susceptible of multiple interpretations, and is not defined by plaintiffs. As stated in the Complaint, said phrase is unintelligible.

24. Kodak admits that it is a New Jersey corporation, that it maintains its principal place of business in Rochester, New York, and that it manufactures, sells and services products including new and used micrographic and photocopy equipment, and supplies and parts for that equipment. Kodak denies each and every remaining allegation contained in paragraph 24 of the Complaint, except to allege that it can neither admit nor deny plaintiffs' allegations concerning the manufacture or publication of products on an "original equipment manufacture basis," and allegations concerning "any appreciable volume or other basis," because these phrases are susceptible of multiple interpretations, and are not defined by plaintiffs. As stated in the Complaint, said phrases are unintelligible.

25. Kodak denies each and every allegation contained in paragraph 25 of the Complaint, except to admit that Kodak's Customer Equipment Services Division performs repairs and service on Kodak micrographic and photocopying equipment on both a service contract and per call basis.

26. Kodak denies paragraph 26 of the Complaint in its entirety.

27. Kodak denies each and every allegation contained in paragraph 27 of the Complaint, except to admit that its products are of excellent quality and reputation.

28. Kodak denies paragraph 28 of the Complaint in its entirety.

29. Kodak denies each and every allegation contained in paragraph 29 of the Complaint, except to admit

that Kodak employs personnel with high technical expertise in the manufacture and repair of its products.

30. Kodak denies paragraph 30 of the Complaint in its entirety.

31. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the Complaint, and on that basis, denies such allegations.

32. Kodak denies paragraph 32 in its entirety except to admit that the written Terms of Sale applicable to the purchase of Kodak products in November 1985 speak for themselves.

33. Kodak denies paragraph 33 of the Complaint in its entirety.

34. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34 of the Complaint, and on that basis, denies such allegations.

35. Kodak denies paragraph 35 of the Complaint in its entirety.

36. Kodak denies paragraph 36 of the Complaint in its entirety.

37. Kodak lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of the Complaint, and on that basis, denies such allegations.

38. Kodak denies each and every allegation contained in paragraph 38 of the Complaint, except to admit

that in or following April 1985, Kodak established a business practice pursuant to which parts for newly introduced micrographic products were made available only to Kodak operating units, government customers and Kodak customers.

39. Kodak denies paragraph 39 of the Complaint in its entirety.

40. Kodak denies paragraph 40 of the Complaint in its entirety.

41. Kodak denies each and every allegation contained in paragraph 41 of the Complaint, except to admit that certain plaintiffs may have placed orders for Kodak parts since July 1985 or July 1986.

42. Kodak denies paragraph 42 of the Complaint in its entirety.

43. Kodak denies paragraph 43 of the Complaint in its entirety.

44. Kodak denies paragraph 44 of the Complaint in its entirety.

45. Kodak denies paragraph 45 of the Complaint in its entirety.

46. Kodak denies paragraph 46 of the Complaint in its entirety.

47. Kodak denies paragraph 47 of the Complaint in its entirety.

48. Kodak denies paragraph 48 of the Complaint in its entirety.

49. Kodak denies paragraph 49 of the Complaint in its entirety.

50. Kodak denies paragraph 50 of the Complaint in its entirety.

51. Kodak denies paragraph 51 of the Complaint in its entirety.

52. Kodak denies paragraph 52 of the Complaint in its entirety.

53. Kodak denies paragraph 53 of the Complaint in its entirety.

54. Kodak denies paragraph 54 of the Complaint in its entirety.

55. Kodak denies paragraph 55 of the Complaint in its entirety.

56. Kodak denies paragraph 56 of the Complaint in its entirety.

57. Kodak denies paragraph 57 of the Complaint in its entirety.

58. Kodak denies paragraph 58 of the Complaint in its entirety.

59. Kodak denies paragraph 59 of the Complaint in its entirety.

60. Kodak denies paragraph 60 of the Complaint in its entirety.

61. Kodak denies paragraph 61 of the Complaint in its entirety.

62. Kodak denies each and every allegation contained in paragraph 62 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 62 of the Complaint.

63. Kodak incorporates by reference paragraph 2 of this Answer.

64. Kodak incorporates by reference paragraphs 3 through 23 of this Answer.

65. Kodak incorporates by reference paragraphs 24 and 25 of this Answer.

66. Kodak incorporates by reference paragraphs 26 through 37 of this Answer.

67. Kodak incorporates by reference paragraphs 38 through 59 of this Answer.

68. Kodak denies paragraph 68 of the Complaint in its entirety.

69. Kodak denies paragraph 69 of the Complaint in its entirety.

70. Kodak denies paragraph 70 of the Complaint in its entirety.

71. Kodak denies each and every allegation contained in paragraph 71 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 71 of the Complaint.

72. Kodak incorporates by reference paragraph 2 of this Answer.

73. Kodak incorporates by reference paragraphs 3 through 23 of this Answer.

74. Kodak incorporates by reference paragraphs 24 and 25 of this Answer.

75. Kodak incorporates by reference paragraphs 26 through 37 of this Answer.

76. Kodak incorporates by reference paragraphs 38 through 59 of this Answer.

77. Kodak denies paragraph 77 of the Complaint in its entirety.

78. Kodak denies paragraph 78 of the Complaint in its entirety.

79. Kodak denies paragraph 79 of the Complaint in its entirety.

80. Kodak denies each and every allegation contained in paragraph 80 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 80 of the Complaint.

81. Kodak incorporates by reference paragraph 2 of this Answer.

82. Kodak incorporates by reference paragraphs 3 through 23 of this Answer.

83. Kodak incorporates by reference paragraphs 24 and 25 of this Answer.

84. Kodak incorporates by reference paragraphs 26 through 37 of this Answer.

85. Kodak incorporates by reference paragraphs 38 through 59 of this Answer.

86. Kodak denies paragraph 86 of the Complaint in its entirety.

87. Kodak denies paragraph 87 of the Complaint in its entirety.

88. Kodak denies paragraph 88 of the Complaint in its entirety.

89. Kodak denies each and every allegation contained in paragraph 89 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 89 of the Complaint.

90. Kodak incorporates by reference paragraphs 1 through 3, 9, and 19 through 61 of this Answer.

91. Kodak denies each and every allegation contained in paragraph 91 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in California.

92. Kodak denies paragraph 92 of the Complaint in its entirety.

93. Kodak denies each and every allegation contained in paragraph 93 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 93 of the Complaint.

94. Kodak incorporates by reference paragraphs 1, 2, 4, 14, 21 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

95. Kodak denies each and every allegation contained in paragraph 95 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in New Jersey.

96. Kodak denies paragraph 96 of the Complaint in its entirety.

97. Kodak denies each and every allegation contained in paragraph 97 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 97 of the Complaint.

98. Kodak incorporates by reference paragraphs 1, 2, 13, 15, 21 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

99. Kodak denies each and every allegation contained in paragraph 99 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in Missouri.

100. Kodak denies paragraph 100 of the Complaint in its entirety.

101. Kodak denies each and every allegation contained in paragraph 101 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 101 of the Complaint.

102. Kodak incorporates by reference paragraphs 1, 2, 10, 18, 21 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

103. Kodak denies each and every allegation contained in paragraph 103 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in Minnesota.

104. Kodak denies paragraph 104 of the Complaint in its entirety.

105. Kodak denies each and every allegation contained in paragraph 105 of the Complaint, except to admit

that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 105 of the Complaint.

106. Kodak incorporates by reference paragraphs 1, 2, 11, 12, 21 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

107. Kodak denies each and every allegation contained in paragraph 107 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in Colorado.

108. Kodak denies paragraph 108 of the Complaint in its entirety.

109. Kodak denies each and every allegation contained in paragraph 109 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 109 of the Complaint.

110. Kodak incorporates by reference paragraphs 1, 2, 5, 21 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

111. Kodak denies each and every allegation contained in paragraph 111 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in Pennsylvania.

112. Kodak denies paragraph 112 of the Complaint in its entirety.

113. Kodak denies each and every allegation contained in paragraph 113 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 113 of the Complaint.

114. Kodak incorporates by reference paragraphs 1, 2, 7, 21 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

115. Kodak denies each and every allegation contained in paragraph 115 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in Illinois.

116. Kodak denies paragraph 116 of the Complaint in its entirety.

117. Kodak denies each and every allegation contained in paragraph 117 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 117 of the Complaint.

118. Kodak incorporates by reference paragraphs 1, 2, 8, 21 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

119. Kodak denies each and every allegation contained in paragraph 119 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in Georgia.

120. Kodak denies paragraph 120 of the Complaint in its entirety.

121. Kodak denies each and every allegation contained in paragraph 121 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 121 of the Complaint.

122. Kodak incorporates by reference paragraphs 1, 2, 16, 21 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

123. Kodak denies each and every allegation contained in paragraph 123 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in New York.

124. Kodak denies paragraph 124 of the Complaint in its entirety.

125. Kodak denies each and every allegation contained in paragraph 125 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 125 of the Complaint.

126. Kodak incorporates by reference paragraphs 1, 2, 17, 21 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

127. Kodak denies each and every allegation contained in paragraph 127 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in Texas.

128. Kodak denies paragraph 128 of the Complaint in its entirety.

129. Kodak denies each and every allegation contained in paragraph 129 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 129 of the Complaint.

130. Kodak denies paragraph 130 of the Complaint in its entirety.

131. Kodak incorporates by reference paragraphs 2 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

132. Kodak denies each and every allegation contained in paragraph 132 of the Complaint, except to admit that it has offices in, is qualified to do business in, and does a substantial amount of business in each of the states in which plaintiffs purport to be incorporated and in which each plaintiff purports to maintain its principal place of business.

133. Kodak denies paragraph 133 of the Complaint in its entirety.

134. Kodak denies paragraph 134 of the Complaint in its entirety.

135. Kodak denies paragraph 135 of the Complaint in its entirety.

136. Kodak denies paragraph 136 of the Complaint in its entirety.

137. Kodak denies paragraph 137 of the Complaint in its entirety.

138. Kodak denies each and every allegation contained in paragraph 138 of the Complaint, except to admit that plaintiffs purport to bring this action pursuant to the provisions set forth in paragraph 138 of the Complaint.

139. Kodak denies paragraph 139 of the Complaint in its entirety.

140. Kodak incorporates by reference paragraphs 2 through 61, 68 through 70, 77 through 79, and 86 through 88 of this Answer.

141. Kodak denies each and every allegation contained in paragraph 141 of the Complaint, except to admit

that it has offices in, is qualified to do business in, and does a substantial amount of business in each of the states in which plaintiffs purport to be incorporated and in which each plaintiff purports to maintain its principal place of business.

142. Kodak denies paragraph 142 of the Complaint in its entirety.

143. Kodak denies paragraph 143 of the Complaint in its entirety.

144. Kodak denies paragraph 144 of the Complaint in its entirety.

145. Kodak denies paragraph 145 of the Complaint in its entirety.

146. Kodak denies paragraph 146 of the Complaint in its entirety.

FIRST AFFIRMATIVE DEFENSE

The Complaint, and each count of it, fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

Each of the claims of the Complaint, in whole or inpart, is barred by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs are barred by laches from asserting any of the claims raised in the Complaint.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs, and each of them, have not been injured in their business or property within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs, and each of them, failed to mitigate any damages purportedly suffered as a result of the conduct alleged in the Complaint.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs, and each of them, are wrongfully attempting to interfere, and are interfering, with the contractual relations between Kodak and purchasers of Kodak parts and service.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs, and each of them, are knowingly and wrongfully attempting to interfere, and are interfering, with prospective beneficial economic relationships of Kodak.

EIGHTH AFFIRMATIVE DEFENSE

Kodak's policies regarding the sale of equipment, supplies, and replacement parts for Kodak micrographic and photocopy equipment are reasonable, are necessary to promote interbrand competition, and are lawful.

NINTH AFFIRMATIVE DEFENSE

If any plaintiff has suffered or will suffer damages, any damages said plaintiff has suffered or will suffer were not caused by Kodak but are the result of the conduct of said plaintiff, including, without limitation, said plaintiff's undertaking contractual obligations to provide to customers Kodak supplies and parts that said plaintiff at all times knew it would be unable to purchase from Kodak.

TENTH AFFIRMATIVE DEFENSE

If, as alleged in the Complaint, plaintiffs, or any of them, have purchased supplies and replacement parts from Kodak for resale, plaintiffs have thereby deliberately, fraudulently and in bad faith concealed from Kodak the material fact that they intended to resell the supplies and replacement parts purchased from Kodak, knowing that if that fact had been revealed, Kodak would not have sold them the supplies and parts requested. Plaintiffs have thereby also fraudulently, falsely and in bad faith represented and held themselves out to the public as able and entitled to purchase Kodak supplies and replacement parts from Kodak for resale to plaintiffs' customers, at all times knowing that said representations were false. Plaintiffs are not entitled to any relief at all, and to equitable relief in particular, because of their inequitable conduct in the above-described transactions.

WHEREFORE, Kodak prays for judgment with respect to plaintiffs' Complaint in this action as follows:

(1) That this Court dismiss the Complaint with prejudice;

(2) That defendants be awarded their costs and expenses including attorneys' fees incurred by reason of this action; and

(3) That this Court grant such other and further relief as it may deem just and proper.

Dated: May 12, 1987.

McCUTCHEN, DOYLE,
BROWN & ENERSEN
DONN P. PICKETT
DANIEL M. WALL
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, v. EASTMAN KODAK COMPANY, Defendant.	No. C 87 1686 WWS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Date: September 11, 1987 Time: 9:00 a.m.

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I. INTRODUCTION

This action challenges under the antitrust laws two business practices of the defendant Eastman Kodak Company.

First and foremost, plaintiffs challenge a Kodak business practice that limits the sale of replacement parts for Kodak's copier-duplicators and micrographic equipment (the "parts policy"). Kodak's policy is to sell copier parts and Parts for its newer micrographic equipment only to direct Kodak equipment customers. It also places lesser restrictions on sales of parts for older micrographic equipment to entities that are not direct equipment customers.

Plaintiffs are so-called "independent service organizations" ("ISOs"). ISOs sell service on Kodak copiers and micrographic equipment. Plaintiffs do not manufacture

their own parts, but try to obtain parts directly from Kodak. In essence, plaintiffs seek to free-ride on Kodak's investment in equipment manufacturing. Pursuant to the parts policy, Kodak restricts the sale of parts to ISOs and other non-direct equipment customers.

Second, Plaintiffs challenge a Kodak policy on servicing used Kodak brand copiers and micrographic equipment that are sold by refurbishers and used equipment brokers (the "used equipment policy"). Kodak will not offer a service contract on that equipment unless it is first inspected and brought up to basic performance standards by Kodak at the customer's expense.

Both policies are challenged pursuant to every possible antitrust theory. Kodak's actions are alleged to constitute actual and attempted monopolization of various markets, unlawful tying arrangements, and conspiracies in restraint of trade, thus violating Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14. Also, plaintiffs allege violations of numerous state antitrust and unfair competition statutes and advance various state common law theories of recovery.

Kodak is moving for summary judgment now, before the plaintiffs have initiated discovery, because the material facts with respect to the nature of the challenged business practices and their effect on competition are not seriously disputed. This is not a case in which there can be any doubt about what happened or what Kodak's policies mean. Kodak's declarations openly state its policies, which, with relatively minor corrections, are as the Complaint describes them.

In other words, the purpose of this summary judgment motion is not to say "No, we didn't do it." For the most part, Kodak does refuse to sell replacement parts to plaintiffs, and Kodak does place conditions on servicing resold Kodak equipment. The purpose of this motion is to say "Yes, these are our business practices, and they are perfectly lawful." That presents issues of law that are appropriately decided on summary judgment.

The governing law is also not subject to serious dispute. The parts policy is lawful under the controlling authorities of *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987), *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (9th Cir. 1983), and *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972). Those cases stand for the rule that an equipment manufacturer like Kodak, which lacks market power in the relevant equipment markets, may for valid business reasons unilaterally decide not to make replacement parts available to anyone it chooses – and especially to free-riders like plaintiffs. Similarly, the used equipment policy is lawful because the antitrust laws do not force Kodak to service for a set fee equipment of an unknown condition sold by someone other than itself.

II. THE FACTS

A. The Parties

The eighteen plaintiffs in this action allege that they engage in the business of repairing and servicing Kodak copiers and micrographic equipment and the business of buying, reconditioning and selling used Kodak copiers

and micrographic equipment. (Complaint ¶ 21) They do not manufacture the replacement parts which they use to service and refurbish that equipment. Rather, they claim a right to purchase parts, which they broadly define to include tools, test equipment, supplies, and service manuals, from the only company which they identify as their competitor, Kodak. (Complaint ¶ 22) Because they refuse to manufacture any parts or look to alternative sources, plaintiffs contend they cannot operate their businesses unless Kodak sells them parts. (*Id.*)

Kodak, headquartered in Rochester, New York, manufactures photographic equipment and supplies, business equipment and other products. The Kodak Business Units which are relevant to this case are the Copy Products Division and the Business Imaging Systems Division ("BISD"). The Copy Products Division manufactures and markets a line of copier-duplicators sold under the trademark "Ektaprint." (Murray Decl. ¶ 1) BISD manufactures and markets business imaging equipment, principally micrographic equipment such as microfilmers, reader-printers, and computer assisted retrieval systems. (Lacy Decl. ¶ 3) Also relevant to this case is Kodak's Customer Equipment Services Division ("CESD"). It does not make or market any products, but provides the after-sale service for various Kodak Business Units, including Copy Products and BISD. (Lacy Decl. ¶ 12)

B. The Market Setting

1. The Copier Industry

Kodak's Copy Products Division is a participant in the plain paper copier industry. Its Ektaprint copier-duplicators perform the same photocopy function as copiers manufactured by a long list of major firms, including Xerox, the industry giant, IBM, and Japanese firms such as Savin, Canon, Ricoh and Minolta. Kodak's copiers are sold in direct competition with copiers manufactured and sold by these and other firms. (See the Declaration of Michael J. Murray at ¶¶ 3-16 for a detailed description of the copier-duplicator industry.)

Kodak is not a monopolist and does not have any market power in the copier-duplicator industry. In fact, Kodak is not even the largest, let alone a dominant, firm in the industry. No matter how the copier-duplicator market is defined — even if, to narrow the market artificially, alternative reproduction technologies are ignored and copiers are divided into small speed and volume segments — Kodak's market share falls far short of the minimum required to prove actual or potential market power. (Murray Decl. ¶¶ 8-10) Kodak's share of the total plain paper copier market is less than 5 percent. (Murray Decl. Exs. 1, 2) In the high-volume end of that market, the segment in which Kodak is most active, Kodak's segment share percentage is in the twenties or low thirties, depending on how the segment is defined. (Murray Decl. ¶ 9) In contrast, Xerox's comparable share is in the mid-

forties to high-fifties, depending on the segment definition. (Murray Decl. ¶¶ 8-9) Clearly Kodak is no monopolist, nor is there any danger of it becoming one.

2. The Information And Image Management Industry

BISD is a participant in what is generally called the information and image management industry. It manufactures and sells business equipment that is used to manage image information, typically words recorded on paper, by capturing and storing it at very high densities, and retrieving it as needed. (Lacy Decl. ¶ 4) Historically, BISD's main hardware offering has been micrographic equipment such as microfilmers and reader-printers. Today, BISD also manufactures Computer Output Microform ("COM") recorders, which are data processing peripherals that record computer generated data onto microfilm; Computer Assisted Retrieval ("CAR") systems, which utilize computers to locate and retrieve micrographic images; and supplies, such as microfilm, chemicals and paper. (Lacy Decl. ¶ 3)

BISD is not a monopolist and does not have market power in any micrographics or image management market. First, BISD's products are a substitute for other means to store and retrieve information that is in image form, the most important of which is the maintenance of ordinary files of hard copy paper documents. (Lacy Decl. ¶ 4) These alternatives to business imaging equipment prevent Kodak and other business imaging equipment sellers from exerting any market power. (Lacy Decl. ¶ 5) Moreover, Kodak faces strong competition from imaging

equipment makers such as Canon, Minolta, 3M and Bell and Howell. Kodak's share of all U.S. sales of business imaging equipment is less than 20 percent. (Lacy Decl. ¶ 6) Given the competition Kodak faces from business imaging equipment makers and the customer's option to employ hard copy or other file management techniques, it is impossible to conclude that BISD has or could acquire market power in any equipment market.

3. Plaintiff's Market Allegations

Incredibly, plaintiffs deny that there is any competition between Kodak and other equipment manufacturers. Their Complaint alleges that "Kodak micrographic and photocopy equipment are unique products" that are sold in a market unto themselves. (Complaint ¶¶ 26-28) In other words, plaintiffs actually suggest, for example, that a Xerox copier and a Kodak copier that perform the same function, have almost the exact same features, and are comparably priced do not compete.

This specious claim is the foundation of plaintiffs' antitrust theory, for it allows plaintiffs to contend that Kodak has monopoly power in allegedly relevant markets consisting of nothing but its own micrographic and photocopy equipment. (Complaint ¶ 29) That, in turn, allows plaintiffs to argue that Kodak leveraged power from its "brand monopoly" in order to monopolize or attempt to monopolize two other markets: (1) a market for the "repair and service of Kodak micrographic and photocopy equipment" (Complaint ¶ 29); and (2) a market for "the sale of used and reconditioned Kodak micrographic and photocopy equipment" (Complaint ¶ 54). Denying

the existence of interbrand equipment competition is thus critical to plaintiffs' case because without that foundation Kodak admittedly has no power to leverage. However, if there is interbrand equipment competition, plaintiffs' case collapses: the only group of customers from which Kodak could try to extract monopoly profits, Kodak equipment buyers, could easily thwart any such attempt by switching to Xerox, IBM, Canon, Bell & Howell, 3M or some other manufacturer's equipment.

The facts stated in Kodak's declarations establish what is common knowledge to anyone even vaguely familiar with these industries: that Kodak is but one competitor in highly competitive interbrand equipment markets. There can be no genuine dispute about that, and accordingly, whether or not there are also "service" and "used equipment" markets, there can be no dispute that Kodak's challenged business practices could not have had any anticompetitive effects on Kodak's or plaintiffs' customers.

C. The Challenged Business Practices

So far we have spoken of two challenged business practices: the parts policy and the used equipment policy. Since Copy Products and BISD have slightly different variants of these policies, we describe each Division's practice separately.

1. The Copy Products Parts Policy

This is the simplest policy in this case. It is Kodak's business practice to sell parts, publications and tools for

the repair and maintenance of its copiers only to direct copier customers. Kodak does not knowingly sell parts to ISOs or other persons engaged in servicing Kodak copiers owned by others, or to persons who wish to service Kodak copiers they have purchased from sources other than Kodak. (Murray Decl. ¶ 23)

This parts policy has been in effect ever since Kodak entered the copier-duplicator business in 1975. Kodak has always marketed all of its copiers, accessories, supplies and service directly to customers. It has not designated dealers, distributors, resellers, or service agents for those products. (Murray Decl. ¶ 24) The allegation in the Complaint that "[p]rior to July 1985, Kodak . . . sold parts for all Kodak photocopy equipment to plaintiffs" (Complaint ¶ 34) is wrong, at least if that is meant to imply that Kodak sold plaintiffs parts so that they could service Kodak copiers owned by other parties. (Murray Decl. ¶ 24) Kodak has never knowingly sold copier parts to anyone who would use those parts to service someone else's Kodak copier.

2. The Copy Products Used Equipment Policy

Since firms like the plaintiffs began selling used Kodak copiers, Kodak has received requests to service those copiers under Kodak Equipment Maintenance Agreements ("EMAs"). An EMA is a service contract. Under it Kodak agrees to do whatever necessary to keep the equipment running in exchange for a set fee. (Gross Decl. ¶ 2) Since Kodak has no contractual relationship with any resellers, it is not obligated to service copiers they sell, particularly under an EMA. However, Kodak

will do so if the copier is already or can be brought up to basic performance standards.[1] (Murray Decl. ¶ 33) Accordingly, if asked to service such a copier, Kodak's policy is to first insist on the right to inspect it, for which a fee is charged. If the copier is already up to standards, Kodak will offer an EMA. If not, Kodak will make the necessary repairs, but, of course, will charge for the needed work. Then the copier can be put under an EMA. (Murray Decl. ¶ 23) (Attached as Exhibits 7 and 8 to the Murray Decl. are copies of two memoranda explaining this policy in detail.)

3. The BISD Parts Policy

The BISD parts policy is somewhat more complicated than its Copy Products analogue because there are circumstances under which Kodak will sell the plaintiffs parts.

The relevant business practice was adopted by Kodak in April 1985, and distinguishes between "new products" and "older products" as of that date. (The April 12, 1985 memorandum reflecting the policy is Exhibit 1 to the Gross Declaration.) Historically, Kodak sold micrographic equipment parts to anyone, including plaintiffs. Accordingly, Kodak decided to phase in its new parts policy by distinguishing between parts for older and newer products. With respect to older products, Kodak's policy was

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[1] Alternatively, Kodak offers "per call" service to owners of these copiers without any requirement to inspect and bring up to standards. (Murray Decl. Ex. 8, p.4) "Per call" service charges the customer for parts and labor directly.

(and is) to continue selling such parts to anyone, including plaintiffs. (Lacy Decl. ¶ 22; Lorensen Decl. ¶ 4) However, if there is a shortage of a part, orders from ISOs are filled only after Kodak's and its direct equipment customers' needs have been met. (Lorensen Decl. ¶ 6) In addition, certain "all time" parts — parts as to which Kodak has placed a final order with its supplier intended to last for the life of the equipment, and which cannot be ordered again — are often saved for Kodak's customers and are not sold to ISOs. (Lorensen Decl. ¶ 10)

With respect to newer product parts (beginning with the KODAK RELIANT Intelligent Microfilmer 1000), BISD adopted the Copy Products parts policy: parts for new products are made available only to direct equipment customers. (Lacy Decl. ¶ 22)

4. The BISD Used Equipment Policy

The BISD used equipment policy is exactly like the analogous Copy Products policy. It provides that before Kodak will place used equipment of an unknown condition under an EMA, it must be inspected and, if necessary, repaired. (Lacy Decl. ¶ 23)

D. The Business Reasons For Kodak's Practices

The declarations filed in support of this motion detail the business reasons for the challenged practices. They are summarized briefly here. Since Copy Products' and BISD's policies are similarly motivated, the business reasons are discussed by policy rather than by division.

1. The Parts Policies

There are three main reasons for the parts policies:

First, the policies promote interbrand equipment competition. Kodak views exceptional factory service as one component of the total product by which it competes against Xerox, Canon, IBM, Bell and Howell, 3M and its other equipment competitors. It views direct responsibility for service as key to its competitive success.

Second, making and stocking parts for independent service organizations adds to Kodak's inventory costs, with no benefit and with tangible detriment to Kodak.

Third, Kodak believes that if firms like the plaintiffs wish to compete against it, they should be required to invest in the resources needed to do so and should not be allowed to free-ride on Kodak's investment in these businesses for the sole purpose of taking revenues away from Kodak.

a. Promoting Interbrand Competition

As far as Kodak is concerned, it does not compete in any service markets as alleged by plaintiffs. Rather, it manufactures and sells copiers and imaging equipment. Offering service is simply part of offering equipment. Kodak offers service because its equipment, like any sophisticated hardware, breaks down occasionally and requires maintenance regularly. (Murray Decl. ¶ 13; Lacy Decl. ¶ 11) Customers buy Kodak equipment to get a job done — to make copies or manage their files — and unless it is serviced, they are deprived of the benefits of

that equipment. Good service keeps the equipment running and the customer satisfied. Good service enhances Kodak's ability to sell equipment. (Murray Decl. ¶ 13; Lacy Decl. ¶ 12)

In marketing their products, both Copy Products and BISD stress Kodak's commitment to outstanding service. Their advertisements provide visible proof. Discussed in and attached to the Murray and Lacy declarations are examples of recent Kodak advertisements that show potential customers the advantage of using Kodak equipment because Kodak provides the best service in the business.[2] (Murray Decl. ¶¶ 17-22; Lacy Decl. ¶¶ 19-21) Further evidence of Kodak's commitment to service is the fact that surveys among both the copier and micrographic equipment users consistently rate Kodak service number one in customer satisfaction. Kodak heavily advertises that fact in marketing its copiers and micrographic equipment against its competitors. (Murray Decl. ¶ 19; Lacy Decl. ¶ 20)

The relationship of service to the underlying equipment offering was at the heart of Kodak's decisions to adopt the challenged parts policies. Indeed, the main reason that Kodak adopted the copier parts policy back in 1975 was to bolster its emphasis on quality service as part of its basic business strategy for marketing its copiers.

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[2] The thrust of all of these advertisements is that when someone buys Kodak equipment, they get "more than just equipment" (see Exhibit 2 to Lacy Decl.); they get superlative service that translates into better productivity. One of Kodak's advertising campaigns summed up this theme with what was dubbed "The Kodak Advantage" — "leading technology, proven reliability and the best service in the business." (Murray Decl. ¶ 22 & Ex. 4)

(Murray Decl. ¶ 26) The same consideration influenced BISD's decision to adopt a modified parts policy in April 1985. (Lacy Decl. ¶ 25) By then, ISOs were active in the micrographic industry, primarily servicing older, less sophisticated reader-printers. But at that time, Kodak's new equipment offerings were undergoing a rapid advance, especially relating to the use of computerized document retrieval systems. (Lacy Decl. ¶ 25) Consequently, Kodak felt that even though it had sold parts on its older micrographic equipment in the past, and thereby inadvertently lent a hand to the ISOs, it was inappropriate to make parts available on the newer, more sophisticated products that were forthcoming.

The parts policies have also been maintained because Kodak believes that dividing responsibility for product reliability between itself and an ISO damages Kodak's relationship with its direct equipment customers. This happens in two ways. First, when an ISO has replaced Kodak service with a particular customer, Kodak loses the day to day contact with the customer that is crucial to keeping the customer satisfied and learning of potential new sales opportunities. (Lacy Decl. ¶ 27; Murray Decl. ¶ 28) But even more important, divided responsibility inevitably leads to "fingerpointing" whenever an ISO is unable to repair a problem. Wanting to deflect the blame away from themselves, ISOs tend to blame Kodak for the problem, even if it is the result of improper diagnosis, maintenance or repair. (Murray Decl. ¶ 30; Lacy Decl. ¶ 27) Kodak has no opportunity to respond; it may never even hear of the problem. But the customer's image of Kodak is tarnished and that hurts Kodak when the customer has future equipment needs. Kodak does not want

to encourage even the possibility of that happening by fostering the efforts of ISOs.

Thus, Kodak's parts policies promote competition by increasing Kodak's competitiveness against its many domestic and Japanese competitors.

b. Reducing Inventories

A second reason for the parts policies is to reduce Kodak's parts inventories and thereby reduce Kodak's costs. This was the main reason that Kodak changed its policy with respect to older micrographic parts, it figured prominently in the decision not to sell newer micrographic parts, and it supports continuation of the copier parts policy.

Reducing inventory costs was the direct catalyst for BISD's parts policy. (Lacy Decl. ¶ 29; Gross Decl. ¶ 6) In early 1985, Kodak's management directed all of the company's divisions to improve their return on assets. CESD, the division that services Kodak's copiers and micrographic equipment, had only one substantial physical asset, its parts inventory. However, that was a large asset; in early 1985, Kodak had over $16 million of micrographic equipment parts in stock. (Gross Decl. ¶ 6) That was too high, so BISD and CESD management looked for ways to reduce inventories. (*Id.*)

One way was to stop making, buying and stocking parts for the benefit of ISOs. BISD and CESD management felt it made no sense for Kodak to assist these firms by manufacturing or purchasing, and then maintaining inventories of, micrographic equipment parts for their

benefit. (Gross Decl. ¶ 6; Lacy Decl. ¶ 29) They felt that these firms ought to obtain their own parts and bear all of the associated expenses themselves. That would significantly reduce Kodak's inventories and improve its return on assets. (*Id.*) Thus it was decided not to sell parts for newer products to entities other than direct equipment customers.

A less restrictive but consistent rule was adopted as to parts for older micrographic equipment. Because it had sold these parts to ISOs in the past, Kodak decided to continue selling them to ISOs. (Gross Decl. ¶ 9) However, Kodak felt that, at the very least, some of the burden of holding these parts in inventory ought to be shifted to the ISOs. Accordingly, Kodak reserved the right to hold and consolidate orders from ISOs so that rather than being filled from Kodak's inventories, they could be filled by placing orders from Kodak's suppliers. (Gross Decl. ¶¶ 9-10) In practice, that has happened infrequently because Kodak's inventories of most parts are so high that in most cases it makes sense to fill the ISO's part order immediately. (Lorensen Decl. ¶¶ 8-9) But shifting inventory costs to the parties that caused them, the ISOs, was a major reason for the adoption of the BISD parts policy. (Lacy Decl. ¶ 29)

c. Not Supporting Free-Riding

Finally, another reason for the parts policies is that Kodak does not want to help the ISOs take away service revenues from Kodak.

ISOs are free-riders. Unlike Kodak, which has invested hundreds of millions of dollars in its copier and imaging equipment businesses, the ISOs have invested virtually nothing. (Lacy Decl. ¶ 28; Murray Decl. ¶ 31) They refuse to make their own parts or obtain them from other sources. And they certainly do not invest in high quality service, for example by investing in training, the way Kodak does. (Lorensen Decl. ¶ 12; Gross Decl. ¶ 12; Lacy Decl. ¶¶ 25, 27; Murray Decl. ¶¶ 27, 29) In fact, most of the ISOs who target Kodak are former Kodak service people who were trained by Kodak at Kodak's expense. (Lacy Decl. ¶ 28; Murray Decl. ¶ 29)

The reason ISOs target service revenues is obvious. If they can get parts from Kodak, ISOs can offer some level of service on a virtual shoestring. Their market is made for them by Kodak at Kodak's expense. And they can underprice Kodak because ISOs do not need to recapture the huge investment Kodak made in the business.

Kodak does not feel obligated to promote the activities of free-riders like plaintiffs, whose sole business is targeting revenues which would otherwise be Kodak's. Because it must compete against the likes of Xerox, IBM, Bell and Howell and numerous Japanese firms, it is hard enough for Kodak to make an adequate return on its investments in these industries. (Murray Decl. ¶ 32) It would be even harder if Kodak were forced to assist ISOs in their efforts to take away Kodak's service revenues, an important part of the total return on those investments. In fact, if Kodak is required to assist ISOs, and they take away Kodak's service revenues, the result in the long run will be anticompetitive. Investment in these industries will be less attractive, and Kodak will be forced to reduce

the commitment to service it has brought to these markets. That will be to the detriment of both customers and Kodak, whose service-based marketing strategy has served the interests of competition well.

Accordingly, quite apart from all of the other reasons motivating the parts policy, Kodak has declined to sell parts to the ISOs because it does not want to help them take away revenues from Kodak. If the ISOs want to compete against Kodak, they, like Xerox and 3M and Kodak's other legitimate competitors, should develop at their expense the resources needed to do so.

2. The Used Equipment Policy

There is one main business reason for the used equipment policy, and it is very simple. When Kodak reviewed this policy (both for Copy Products and BISD). Kodak was experiencing recurring problems with resold copiers and micrographic equipment. (Murray Decl. ¶ 34; Gross Decl. ¶ 2) On many occasions, the reseller would tell their prospective customer that Kodak would service the machine in the future under an EMA service contract. No resellers were associated with Kodak and, therefore, none had authority to make those representations. (Gross Decl. ¶ 2) But they were made, and Kodak was left to deal with the customer, who had a Kodak machine and an expectation of getting Kodak service.

Of course, Kodak would ordinarily be willing to sell an EMA, but selling an EMA on used equipment was another matter. Used equipment was sold in various states of repair, ranging from well maintained to very

poorly maintained. (Murray Decl. ¶ 34; Gross Decl. ¶ 3) The economics of an EMA, however, are dependent on the machine being in good repair, much like the economics of life insurance are dependent on the health of the insured. Very simply, Kodak did not want to take an unwise business risk by placing a machine of unknown condition under an EMA that would obligate us to do whatever necessary to fix it. (Gross Decl. ¶ 5; Murray Decl. ¶ 34) So Kodak adopted a policy of prior inspection and, if needed, repair. (*Id.*)

III. ARGUMENT

A. Plaintiff's Claims Are Properly Disposed Of By Summary Judgment

In recent years, the Supreme Court has made it clear that summary judgment is no longer to be regarded as inappropriate in complex litigation, including antitrust cases:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just speedy and inexpensive determination of every action."

Celotex Corp. v. Catrett, ___ U.S. ___, 106 S. Ct. 2548, 2555 (1986) (wrongful death action); *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, ___ U.S. ___, 106 S. Ct. 1348 (1986) (antitrust conspiracy claim). Indeed, "summary judgment is often 'particularly appropriate' in antitrust cases, because of the 'fearful dimensions' of such cases," and the enormous resources that are devoted to

them. *Ralph C. Wilson Industries, Inc. v. American Broadcasting Cos.*, 598 F. Supp. 694, 699 (N.D. Cal. 1984), *aff'd*, 794 F.2d 1359 (9th Cir. 1986).

The particular antitrust theories advanced by plaintiffs are susceptible to summary adjudication. Plaintiffs' monopolization claim requires it to prove the relevant market(s), the existence of market power, and harm to competition. All of these issues may be addressed on summary judgment. *Consul Ltd. v. Transco Energy Co.*, 805 F.2d 490 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987) (proof of relevant market); *Barry v. Blue Cross of California*, 805 F.2d 866 (9th Cir. 1986) (market power based on market share analysis); *Assam Drug Co., Inc. v. Miller Brewing Co., Inc.*, 798 F.2d 311 (8th Cir. 1986) (market power); *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 635 (9th Cir. 1987) (absence of injury to competition). Issues of intent to monopolize by refusals to deal, the heart of plaintiffs' case, can also be resolved by summary judgment. *Dimidowich*, 803 F.2d at 1478-79; *Great Escape Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986) (intent to monopolize). And plaintiffs' tying allegations are similarly subject to summary disposition. *Roberts Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 732 F.2d 1403, 1407-08 (9th Cir. 1984); *Great Escape*, 791 F.2d at 537.

This case is a perfect example of an antitrust case that is appropriate for summary judgment. Fundamentally, the issue in this case is one of law: whether an equipment manufacturer that lacks market power in the relevant equipment market may choose not to sell replacement parts to independent service firms. The evidentiary or historical facts bearing on this question are not subject to

substantial dispute. Kodak's policies are what they are, and the market setting, in particular the fact of intense interbrand equipment competition, is clear. What is needed now is for the Court to apply these facts to the substantive antitrust law that governs this case in order to determine whether, as a matter of law, Kodak's policies can be deemed anticompetitive.

B. Kodak's Parts Policy Is Not Anticompetitive And Does Not Violate The Sherman Act

1. The Basic Rule Of *Bushie, Calculators Hawaii* And *Dimidowich*

This is a typical replacements parts case, very similar to those the Ninth Circuit considered in *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972), *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (9th Cir. 1983), and *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987). All three of those cases upheld almost identical parts policies against charges of actual and attempted monopolization. In them the Ninth Circuit has established that as a matter of law a manufacturer lacking market power in the relevant interbrand equipment market may for valid business reasons unilaterally decide not to sell replacement parts to whomever it chooses.

In *Bushie*, a retailer of Stenocord dictating machines sued Stenocord after his distributorship was terminated. Plaintiff contended that the termination amounted to monopolization of both a market for the sale of Stenocord dictating machines and a market for servicing Stenocord machines. 460 F.2d at 118 n.1. In other words, plaintiff

advanced market allegations perfectly analogous to those the plaintiffs advance in this case. The Ninth Circuit affirmed a summary judgment, because the existence of active interbrand equipment competition made any "monopoly" over the sale and service of the manufacturer's own product immaterial:

> A manufacturer has a "natural monopoly over his own products, especially when the products are sold under trademark . . . . " Unless the manufacturer used his natural monopoly to gain control of the *relevant* market *in which his products compete*, the antitrust laws are not violated.

Id. at 120 (citations omitted; emphasis added). Thus, only if the plaintiff could establish an interbrand monopoly, in the court's words "total market dominance — as distinguished from 'brand' monopoly," would a viable antitrust action lie. *Id.*

The same result was reached, although for different reasons, in *Calculators Hawaii*. Again, the issue was a manufacturer's refusal to sell replacement parts for its Products. The defendant, Brandt, Inc., manufactured money-handling machines. For some years it marketed its products in Hawaii through a distributor which had contracted with the plaintiff, Calculators Hawaii, to service and repair Brandt's products. In this role, Calculators Hawaii purchased repair parts from Brandt. 724 F.2d at 1336.

In 1976 Brandt altered its distribution system by replacing its distributor with a sales agent. The agent was given the exclusive right to both sell and service Brandt's products in Hawaii, and, accordingly, Brandt thereafter refused to sell replacement parts to Calculators Hawaii.

Id. Calculators Hawaii brought an antitrust action, and in a bench trial prevailed on its claim that the refusal to sell parts restrained trade in and monopolized a market for "Brandt parts." *Id.* at 1337-39.

The Ninth Circuit reversed. Unlike in *Bushie*, the court did not directly address market definition or power. *Id.* at 1338. Instead, the court found that Brandt's parts policy did not restrict competition, did not evidence an intent to monopolize, and was not predatory. *Id.* at 1338 (re Section 1 claims) & 1339 (re Section 2). The court analogized the parts policy to an exclusive dealing arrangement. Such an arrangement, by definition, contemplates refusals to deal with others, and as a consequence those others lose business. But, the court held, that "is simply insufficient" to prove either anticompetitive effect or intent. *Id.* at 1337.[3] Indeed, the court held that in the absence of proof of harm to competition — an "absolutely essential" element of the case — the manufacturer did not even need to advance valid business reasons for its policy in order to prevail. *Id.* at 1338.

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[3] In fact, exclusive dealing arrangements are subject to antitrust scrutiny *only* for their potential effects on interbrand equipment competition. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) ("Exclusive-dealing arrangements may, in some circumstances, create or extend market power of a supplier . . . and may thus restrain horizontal competition"). They are presumed not to harm competition when "other and equivalent brands of [the relevant product] are readily available in the market." *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 376 (1967), *overruled on other grounds in Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

Finally, in Dimidowich the Ninth Circuit considered a parts policy that in all but one key respect was virtually identical to Kodak's — a policy maintained by Kodak's competitor in the business imaging market, Bell and Howell. Bell & Howell's policy is not to sell replacement parts for its micrographic equipment except through its own service organization, or directly to owner-users. 803 F.2d at 1475. There is, however, one critical exception to this policy. In parts of the southwest, Bell and Howell does not distribute or service its products directly, but rather uses a distributor, Comgraphix. *Id.*

Dimidowich, an ISO like the Plaintiffs here, challenged Bell and Howell's parts Policy. He argued numerous theories of liability, including monopolization and a conspiracy in restraint of trade between Bell and Howell and Comgraphix. The district court granted summary judgment on the monopolization claim based on *Bushie*. 590 F. Supp. at 49-50. The Ninth Circuit affirmed, albeit on different grounds. 803 F.2d at 1478. It observed that "[a] manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws." *Id.*

The district court had also granted summary judgment on the conspiracy claim, but the Ninth Circuit reversed that decision. The sole reason was that the relationship between Bell and Howell and Comgraphix, which the court characterized as a "hybrid" relationship with both horizontal and vertical elements, very nearly made plaintiff's conspiracy claim a per se offense. *Id.* at 1484 ("[i]n the absence of a vertical component," agreement if proved would have been per se illegal). Thus,

even though the court recognized that in the ordinary case the manufacturer's assertions of legitimate business reasons for its conduct would result in summary judgment, it ruled that "when *this type of hybrid arrangement* is at issue, . . . the balancing of the anticompetitive effects against the asserted justifications must be left to the jury." *Id.* (emphasis supplied).

Of course, since Kodak has no distributors whatever (Murray Decl. ¶ 24; Lacy Decl. ¶ 3), the conspiracy portion of the *Dimidowich* decision is irrelevant to this case. *Dimidowich* is nonetheless significant for three reasons. First, it affirmed the district court's grant of summary judgment on the monopolization claims. Second, it reaffirmed the right of a manufacturer, acting unilaterally, to choose among its customers. And third, by carefully distinguishing between the peculiar "hybrid" conspiracy at issue and the vertical conspiracies considered in *Calculators Hawaii* and *Bushie*, the Ninth Circuit reaffirmed the vitality of *Calculators Hawaii* and *Bushie* in the ordinary case such as this one. *Id.* at 1481 n.4.

These cases establish as a matter of law that Kodak, acting unilaterally, has every right to choose to whom it will and to whom it will not sell replacement parts. That rule is as it should be, for quite apart from the legal precedents, it is clear as a matter of undisputed fact that Kodak's practices could not have harmed competition.

The fundamental question is whether Kodak's practices are harmful to consumers. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, ___ U.S. ___, 105 S. Ct. 2847, 2859 (1985) (necessary "to examine the effect of the challenged pattern of conduct on consumers"); *see also, Calculators*

Hawaii, 724 F.2d at 1337 (harm to plaintiff "simply insufficient" to prove anticompetitive effect). Plaintiffs argue that the relevant group of consumers are purchasers of Kodak products — the only consumers in the alleged markets for the service and repair of Kodak equipment. (Complaint ¶ 30) That correctly identifies the group of affected consumers. Although Kodak disagrees with plaintiffs' attempt to carve out a service "market,"[4] it is clear that Kodak's practices could only harm, if anyone, Kodak customers.

Thus, the critical question is whether, by declining to sell parts to plaintiffs, Kodak obtained the ability to charge its customers supra-competitive prices for Kodak service. The answer is unquestionably "no." When Kodak's customers chose to buy Kodak equipment, they indisputably could have purchased equipment from one

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[4] Some courts have disposed of replacement parts cases by finding that the relevant market could not be confined to servicing one manufacturer's products. *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 282 (5th Cir. 1978) *cert. denied*, 440 U.S. 939 (1979); *cf. MLC, Inc. v. North American Philips Corp.*, 1983-1 Trade Cases (CCH) ¶ 65,351, p. 70,093 (S.D.N.Y. 1983). While that is perfectly valid, it is not strictly necessary to determine whether there is any separate service market and, if there is, whether it is limited to servicing one or more brands of equipment. Plaintiffs' theory of the case is that Kodak used a by-product of its alleged monopoly in Kodak equipment, its exclusive control of Kodak parts, to monopolize the service markets. If Kodak has no equipment monopoly, as the undisputed facts demonstrate, then Kodak has no monopoly power to leverage into any other market, including any service market. In that case — this case — the existence and contours of any service market are irrelevant.

of Kodak's many competitors. Therefore, any service customer worried about being charged supra-competitive prices for service, or actually charged such prices, could easily thwart such a price by simply buying some other manufacturer's equipment. Kodak knows this, and it deliberately prices its service contracts to be competitive with its equipment competitors. (Murray Decl ¶ 11; Lacy Decl. ¶ 9) In this way, interbrand equipment competition prevents Kodak from restraining competition or exerting market power in any market, including any hypothetical service market.

2. The Parts Policy Is Based On Valid Business Justifications

Calculators Hawaii makes its clear that Kodak does not even need to advance the business reasons for its policy unless an adverse effect on competition is first demonstrated, and plaintiffs cannot do that. Of course, as discussed above (pp. 11-18), Kodak had and has solid reasons for adopting and maintaining the challenged policies.

Kodak has adopted the parts policy because (a) it believes that by taking direct responsibility for the repair and maintenance of its products it can better compete against other equipment manufacturers, (b) it can reduce inventory costs, and (c) it does not want to support free-riders who do nothing but take away revenues that are rightfully part of Kodak's return on its investment in manufacturing. Every one of those reasons, and the parts policy itself, promotes interbrand competition between

equipment manufacturers. And that, interbrand competition, "is the Primary concern of antitrust law." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977) ("*Sylvania*").

The courts have frequently recognized that promoting good service in order to make a product more attractive fosters interbrand competition. Thus, they have upheld against antitrust challenge a wide variety of vertical restrictions designed to improve a manufacturer's competitiveness by assuring adequate service for the manufacturer's products. *See, e.g., Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195-1201 (6th Cir. 1982); *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 663 F.2d 405, 410 (2d Cir. 1981). In *Sylvania* itself, the Supreme Court recognized that "service and repair are vital for many products," and that restrictions designed to ensure adequate service of a manufacturer's products could make those products more attractive, and thereby enhance interbrand competition. 433 U.S. at 55. Thus, Kodak's unilateral efforts to assure that its products are consistently and properly serviced are not anticompetitive, they are procompetitive.

Kodak's desire to reduce inventories by not making, buying or stocking parts for ISOs is also procompetitive. Eliminating costs unnecessary to delivering its own product – Kodak equipment and associated service – makes Kodak more efficient. Promoting efficiency is one of the principal goals of the antitrust laws. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 21-22 (1979); *N.C.A.A. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 103 (1984). Interbrand competition

is directly served by policies which increase Kodak's efficiency.

Finally, the courts have frequently recognized that interbrand competition is promoted by policies which eliminate free riders. *Sylvania*, 433 U.S. at 55; *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011, 1015 (9th Cir. 1982), *cert. denied*, 464 U.S. 829 (1983) (firms "more likely to expend the effort necessary to promote or service a product if they did not have to worry about [others] taking a 'free ride' on their efforts"); *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1468 (9th Cir. 1986) (elimination of "free riders" to promote interbrand competitiveness "is both legitimate and lawful."). Therefore, Kodak's desire to eliminate the efforts of ISOs to free ride on Kodak's investment in the copier and imaging equipment businesses is also procompetitive.

At bottom, Kodak believes that the antitrust laws should not prevent it from enjoying the fruits of its own labors. If there are such things as relevant service markets, there is no question that Kodak has a big advantage over plaintiffs in competing for service business: Kodak has plenty of parts. But Kodak has those parts because it has invested in the development and manufacture of copiers and micrographic equipment. There can be no doubt that Kodak's willingness to invest capital in manufacturing has greatly benefited competition and consumers. As a "reward" for its efforts, Kodak should not now be required to give ISOs parts that can only be used to take away revenues that would otherwise reward Kodak's investment. Such a rule would deter investment in manufacturing — a difficult enough venture in these

days of global competition — and thus would be distinctly anticompetitive.

Indeed, if there are such things as relevant service markets separate and distinct from the greater equipment markets, then the following passage from *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), sums up Kodak's case:

> So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity . . . . These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.

C. Plaintiffs Cannot Create An Antitrust Violation By Alleging One Brand Markets, Generic Conspiracies, Or Tying Arrangements

Plaintiffs are obviously aware of the rule of *Bushie, Calculators Hawaii* and *Dimidowich*, for the Complaint attempts to evade it by advancing three specious contentions: (1) that Kodak copiers and imaging equipment are so unique that they are markets unto themselves, (2) that Kodak's parts policy is the product of some type of conspiracy, and (3) that Kodak's parts policy constitutes an unlawful tying arrangement. None of these arguments works.

1. The Relevant Equipment Markets Are The Interbrand Markets In Which Kodak's Products Compete

Plaintiffs attempt to salvage their Section 2 claim by arguing that Kodak equipment is "unique" and does not

face competition from equipment made by other manufacturers. (Complaint ¶¶ 26-29) Since, by definition, Kodak produces 100% of all Kodak equipment, this allegation allows plaintiffs to contend that Kodak's control over equipment parts is in fact an incident of monopoly power in the Kodak equipment markets.

This contention is nonsense, both factually and legally. It is black letter law that the relevant market must include "all products that are 'reasonably interchangeable,' and so can be said to compete with each other for the same buyers' dollars." *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 972 (9th Cir. 1983); *see generally, Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Accordingly, the courts have repeatedly rejected arguments that one manufacturer's brand of a product constitutes a relevant market or submarket. *See Kaplan v. Burroughs Corp.*, 611 F.2d 286, 295 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980) (relevant market included not only users of computer system, but potential users of comparable systems); *MLC, Inc. v. North American Philips Corp.*, 1983-1 Trade Cases (CCH) ¶ 65,351, p. 70,093 (S.D.N.Y. 1983) (single brand component product did not constitute a relevant product market); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 282 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979) (single-brand service market rejected in replacement parts case).

Here, the same holding is required as a matter of indisputable fact. Kodak equipment is sold in competition with similar equipment offered by other manufacturers such as Xerox, IBM, 3M, Bell and Howell, and numerous Japanese firms. (Murray Decl. ¶¶ 10-11; Lacy

Decl. ¶¶ 6-8) Kodak's products perform the same function as its competitors' products, they are priced to compete against those products, and customers choose between those products. (Murray Decl. ¶ 11; Lacy Decl. ¶ 9) Customers can switch from Kodak equipment to that of another manufacturer and frequently do so, particularly as a result of generous trade-in policies that Kodak and other manufacturers maintain in order to encourage switches to their equipment. (Murray Decl. ¶ 16; Lacy Decl. ¶¶ 17-18)

Against this evidence, plaintiffs' bald assertion that Kodak equipment is "unique" and "differentiated in the industry" (Complaint ¶ 27) is unavailing. The same assertion can be made of virtually any brand-name product, but that does not create a relevant market for every brand of every product. Plaintiffs' attempt to establish the monopoly power essential to its case through a one-brand market must be rejected.

2. Kodak Unilaterally Adopted The Parts Policy

Next, plaintiffs try to state a claim by alleging that the parts policy is the product of one to four generic conspiracies that violate Section 1 of the Sherman Act. We say generic conspiracies because plaintiffs have not identified one single person or entity with whom Kodak supposedly conspired. Rather, they have alleged that Kodak conspired with unnamed parties from four generic groups: (1) OEM suppliers of parts for Kodak equipment (Complaint ¶ 52); (2) owners of Kodak equipment (Complaint ¶ 53); (3) other independent service organizations

(Complaint ¶ 55); and (4) financial institutions (Complaint ¶ 56).

Plaintiffs' conspiracy allegations are completely conclusory; so much so that they fail even to state a cause of action. *See International Television Productions, Ltd. v. Twentieth Century Fox Television Div. of Twentieth Century-Fox Film Corp.*, 622 F. Supp. 1532, 1537 (S.D.N.Y. 1985) (Section 1 complaint must identify alleged coconspirators and describe the nature and effects of the alleged conspiracy in more than conclusory language). But more than that, plaintiffs' conspiracy allegations are simply and demonstrably false.

Kodak's declarations unequivocally deny the existence of any conspiracies, and unequivocally state that the parts policy was the product of Kodak's unilateral decisionmaking. (Murray Decl. ¶ 35; Gross Decl. ¶ 13; Lacy Decl. ¶ 32; Lorenson Decl. ¶ 13). Therefore, in order to survive Kodak's motion for summary judgment, plaintiffs must present evidence " 'that tends to to exclude the possibility' that the alleged conspirators acted independently." *Dimidowich*, at 1479, *quoting Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ___ U.S. ___, 106 S.Ct. 1348, 1357 (1986).[5] To do this, plaintiffs must now come

[5] Moreover, it is not enough for plaintiffs to show that Kodak has agreements with some of these entities. Of course Kodak has contracts and other agreements with its customers and suppliers. Plaintiffs must show agreements reflecting "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984).

forward with " '*specific facts* showing that there is a genuine issue for trial.' " *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987) (emphasis by court). That won't happen. Plaintiffs do not have a viable theory of conspiracy, let alone *evidence* of one.

Moreover, even if the existence of one or more of these fanciful conspiracies was assumed, plaintiffs' Section 1 argument would still be subject to summary judgment. It is beyond genuine dispute that Kodak's business practices have not unreasonably restrained competition, but instead are reasonably related to the enhancement of competition in the interbrand markets for copiers and imaging equipment. (*See* pp. 12-15 above) Both *Calculators Hawaii*, 724 F.2d at 1337, and *Bushie*, 460 F.2d at 120, establish as a matter of law that a manufacturer's refusal to sell parts does not adversely affect competition, even when it is the product of a vertical conspiracy.[6] *Dimidowich* confirms this, 803 F.2d at 1481 n.4, and expresses doubt about the propriety of summary judgment only in the peculiar circumstances where a manufacturer engaged in dual distribution has entered into a "hybrid" conspiracy with an authorized distributor. *Id.* at 1484. Since Kodak does not engage in dual distribution and

[6] This is but a specific application of the general principle that a distribution arrangement which does not reduce interbrand competition, even one that is the product of a vertical conspiracy, cannot be deemed to unreasonably restrain trade. *See Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *Kaplan v. Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980).

thus has no authorized distributors (Murray Decl. ¶ 24; Lacy Decl. ¶ 3), there is not even the possibility that plaintiffs here can prove a *Dimidowich*-type hybrid conspiracy.

Accordingly, both because there was no conspiracy and, even if there was, it did not unreasonably restrain trade, Kodak is entitled to summary judgment on plaintiffs' Section 1 claims.[7]

3. Kodak's Refusal To Sell Parts To Plaintiffs Does Not Constitute An Unlawful Tying Arrangement

Plaintiffs have creatively contorted the various products and services at issue in this case into several alleged tying arrangements. However, the imaginative combinations served up by plaintiffs do not, as a matter of law,

[7] Kodak recognizes that plaintiffs will likely respond to this argument by seeking discovery regarding the existence of a conspiracy pursuant to F.R.C.P. 56(f). That is inappropriate for two reasons. First, even if plaintiffs could establish some sort of vertical conspiracy, *Bushie, Calculators Hawaii*, and *Dimidowich* establish that such a conspiracy does not unreasonably restrain competition. Second, before plaintiffs are allowed to drag Kodak through expensive discovery, they at least ought to be required to state a viable theory of discovery and make specific allegations of specific conspiracies. As matters now stand, plaintiffs have alleged that Kodak conspired with members of literally every industry group that has some relationship to the manufacture and marketing of Kodak's products: suppliers, customers, and financial institutions. Discovery on those claims would be as broad and unfocused a fishing expedition as is possible in these industries. It should not be allowed.

present a single unlawful tie. *See generally, General Business Systems*, 699 F.2d at 977-78 (summary judgment for defendant re equipment-service tie affirmed).

In order to show the existence of an unlawful tying arrangement, plaintiffs must show that:

(1) two distinct products or services are in fact tied such that the products are offered as a single package;

(2) the defendant has sufficient economic power in the tying market to impose restrictions in the tied product market; and

(3) the amount of commerce in the tied product is not insubstantial.

General Business Systems, 699 F.2d at 977. In addition, some "modicum of coercion" must be shown. *Mozart Co. v. Mercedes-Benz of North America Inc.*, 593 F. Supp. 1506, 1513 (N.D. Cal. 1984).

None of the tying combinations proposed by plaintiffs creates any factual issue as to the existence of a tying arrangement, market power, or coercion. Therefore, plaintiffs' tying claims must be dismissed.

a. Kodak Service Is Not Tied To The Purchase Of Kodak Equipment

Plaintiffs allege that purchasers of Kodak equipment are required to purchase service from Kodak. (Complaint ¶ 57). This is simply and incontrovertibly false. First, Kodak equipment and service are not sold as an inseparable package. Purchasers of Kodak equipment are free to choose to enter into a service contract with Kodak, to

enter into a service contract with an independent service organization, to engage Kodak or an independent on an as-needed or "per-call" basis, or to perform service themselves. (Murray Decl. ¶ 36; Lacy Decl. ¶ 33) Kodak has never refused or threatened to refuse to sell equipment to anyone because they did not want Kodak service for the equipment. *Id.*

Second, even if Kodak wanted to sell its equipment and service as an inseparable package, Kodak does not have sufficient market power in either the copier or imaging equipment markets to impose restrictions in the alleged "service market." (*See* pp. 4-6, above.) Market power exists in the tying market if:

> (1) the seller has a 'high' share of the tying product market; or
>
> (2) the tying product is a unique product that the seller's competitors are not able to offer; or
>
> (3) a substantial number of consumers have accepted the tie-in, and no factor other than the economic power of the seller explains the acceptance.

Mozart Co. v. Mercedes-Benz of North America, Inc., 593 F. Supp. at 1517. Kodak has no market power in the inter-brand copier or imaging equipment markets. (*See* pp. 4-6, above.) Thus, although Kodak is, by definition, the sole supplier of Kodak brand service, it is not free to raise the price of service, or to compel the purchase of Kodak service. Because consumers choose equipment based on the total price of doing a job, and that total price includes service, overpriced Kodak service would only harm Kodak's competitiveness in the inter-brand equipment

markets. (Lacy Decl. ¶¶ 14-15; Murray Decl. ¶ 15) Alternatively, if Kodak service were unreasonably priced, customers could service their own equipment, in which case they could readily buy parts from Kodak.

b. Kodak Parts Are Not Tied To The Purchase Of Kodak Equipment

Plaintiffs also allege that Kodak customers must purchase Kodak parts if they buy Kodak equipment. In one sense that is mostly true: Kodak equipment is made of Kodak parts, and Kodak is the only source for most of those parts until such time as someone else invests the money to make them. But that is not an unlawful tie-in for two separate reasons.

First, as a condition of buying Kodak equipment Kodak does not demand that its customers buy parts. (Murray Decl. ¶ 36; Lacy Decl. ¶ 33) Customers buy parts only when the equipment malfunctions or regular maintenance requires that something be replaced. If the customer can then obtain the part from a source other than Kodak, Kodak has no contractual or other leverage to keep them from doing so. (*Id.*)

Second, Kodak does not have market power in the tying product markets, the copier and micrographic equipment markets. (*See* pp. 4-6, above.) Accordingly, even if it wanted to, Kodak would not have the power to force customers into buying unwanted parts.

c. Kodak Equipment Is Not Tied To The Purchase Of Kodak Parts

Plaintiffs also allege that Kodak customers are required to buy Kodak equipment as a condition to the

purchase of Kodak parts. (Complaint ¶ 59). This argument is nonsensical. Obviously, the only customers who would have any interest in buying Kodak parts are purchasers of Kodak equipment, just as Xerox customers are the only customers who would be interested in buying Xerox parts. That is simply a reflection of the fact that Kodak equipment is *made* of Kodak parts.

This allegation makes sense only if the interests of customers are ignored and only the interests of the plaintiffs are considered. Plaintiffs' real complaint is that they cannot buy parts to service someone else's Kodak equipment. But that is not the result of a tying arrangement; it is the result of a unilateral refusal to deal. No matter how much Kodak equipment the plaintiffs buy from Kodak, Kodak will never knowingly sell them a copier part or a part for its newer imaging equipment so that they can service equipment other than their own. Thus, even if the plaintiffs were to suggest a tie, *i.e.*, that they be allowed to buy parts for third party service if they bought more Kodak equipment, Kodak would reject the offer.

In any event, even assuming the plaintiffs' allegation states a tying arrangement, it would not be unlawful. Kodak lacks any market power in the parts "market." As the Ninth Circuit recognized in *General Business Systems*, no such power exists unless the defendant could raise prices or impose burdensome conditions on consumers. 699 F.2d at 977, *citing*, *U.S. Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 620 (1977). But the undisputed evidence is that Kodak cannot do that on either parts or service because customers could switch to competing equipment. (Murray Decl. ¶ 16; Lacy Decl. ¶ 17)

In sum, plaintiffs are unable, as a matter of law, to show that Kodak's business practices with regard to parts and service constitute unlawful tying arrangements. Replacement parts policies virtually identical to Kodak's have been examined and found not to constitute unlawful tying arrangements. *See, e.g., General Business Systems*, 699 F.2d at 977; *Dimidowich v. Bell & Howell*, 590 F. Supp. 45, 49 (C.D. Cal. 1984), *aff'd in relevant part*, 803 F.2d 1473 (9th Cir. 1986). Plaintiffs' tying claims should be dismissed.

D. Kodak's Used Equipment Policy Does Not Violate The Antitrust Laws

The used equipment policy does not require extended discussion. There is simply no authority requiring Kodak to service equipment that it did not sell, particularly when it is of an unknown, and possibly poor, condition. To the contrary, the antitrust laws have long recognized that "[a] manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws." *Dimidowich*, 803 F.2d at 1478; *see also Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Kodak's used equipment policy is motivated by valid business reasons. Any EMA is effectively a health insurance policy for the covered equipment. Thus, any EMA presents an element of risk to Kodak. The assessment of this risk is impossible, and the acceptance of equipment for EMA coverage is foolhardy, unless Kodak has an opportunity to determine to its satisfaction that the

equipment is in good working order. (*See* pp. 17-18, above.) Kodak's used equipment policy simply guarantees that Kodak will have the opportunity to assess the "health" of its prospective "insureds," and that Kodak will be paid for the expenses it incurs in making that assessment and any necessary repairs. (*Id.*) Plaintiffs, apparently, seek to make Kodak a blind and involuntary guarantor of every piece of equipment that bears the Kodak label, no matter how worn, abused or altered. This is not Kodak's legal obligation, nor is it sound business practice.

Even apart from the valid business purpose of Kodak's used equipment policy, it is clear that the policy cannot constitute an antitrust violation, because Kodak lacks market power in the interbrand equipment market, even if that market is expanded to include used equipment. (Murray Decl. ¶ 12; Lacy Decl. ¶ 10.) There is nothing unique about used equipment, whether it is manufactured by Kodak or anyone else. It must be priced competitively in order to sell in the overall interbrand equipment market. Any attempt to exercise monopoly power over the sale of used Kodak equipment would fail, because buyers would simply turn to other manufacturers' used equipment or to new equipment.

In sum, Kodak is entitled to summary judgment with respect to the used equipment policy.

E. Plaintiffs' State Law Claims Should Be Dismissed For Lack Of Subject Matter Jurisdiction

Plaintiffs advance claims under the state antitrust and unfair competition laws of each state in which a

plaintiff resides, a total of ten states. Federal subject matter jurisdiction over these claims is based exclusively on the doctrine of pendant jurisdiction. (*E.g.*, Complaint ¶ 89) In such cases, however, it is settled law that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state law claims should be dismissed as well." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Because the plaintiffs' federal antitrust claims must be dismissed, there is no basis for pendent jurisdiction over the state law claims, and those claims should also be dismissed.

IV. CONCLUSION

Kodak has adopted the challenged business practices because they enhance, not restrain, competition. Since the material facts are not in dispute and the law is clear, Kodak is entitled to summary judgment.

Dated: August 14, 1987.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, v. EASTMAN KODAK COMPANY, Defendant.	No. C 87 1686 WWS DECLARATION OF ROBERT A. LORENSON

I, ROBERT A. LORENSON, having been duly sworn, testify as follows:

1. I am presently the Customer Equipment Services Manager, Business Imaging Systems, for the Customer Equipment Services Division of Eastman Kodak Company. I have held my current position since February of 1986. As such, I have had primary responsibility for the administration and implementation of Kodak's business practices with respect to selling replacement parts for Kodak micrographic equipment and servicing used equipment. The purpose of this Declaration is to describe those business practices and the steps taken to implement

them. The facts stated in this Declaration are within my personal knowledge and if called as a witness I could testify competently to them.

2. I assumed my present job responsibilities 10 months after Kodak announced new business practices relating to the sale of replacement parts for our brand name micrographic equipment. Those practices are described in the Declaration of Emmett A. Gross and the April 12, 1985 memorandum attached as Exhibit 1 to that declaration. When I began my new job, Kodak had already implemented that part of the policy which restricted sales of parts on newly introduced micrographic equipment, but had not yet implemented the policy with respect to parts for our older equipment.

3. In July of 1986 we took a step toward implementing that policy by sending a form letter to all the firms we knew of that were buying parts from us to provide third party service. That letter is attached to my Declaration as Exhibit 1. It was signed by Joseph M. O'Brien, who worked for me, but the letter was prepared under my direction and I am responsible for its content.

4. As indicated in the first paragraph, the purpose of the letter was to communicate our replacement parts policy to firms which did not purchase micrographic equipment directly from Kodak. It notes that we manufacture and stock parts to meet the repair needs of our service customers, and that it is not our practice to provide training, publications, tools or parts to firms servicing others' equipment. Accordingly, the letter announced that effective September 1, 1986, we would impose the following conditions and restrictions on orders received

from firms that were not direct purchasers of Kodak equipment:

(a) We would insist that the entity have "previously and regularly purchased parts for the same equipment model." This was meant to "grandfather" existing independent service organizations, and to continue the restriction on sales of parts for newly introduced micrographic equipment.

(b) We placed the firms on notice that their orders would not, as a matter of practice, be filled from Kodak's existing inventories, but would ordinarily be consolidated with orders placed periodically with Kodak's sources of supply. We also told them that we anticipated the lead time for consolidated orders would be 90 days or more. This was designed to require the independent service organizations to order parts in advance and carry them in inventory at their expense, just as Kodak does for itself at its expense.

(c) We stated that "all time" parts would not be available to these firms. "All time" parts are those parts as to which Kodak has placed an order with our supplier for the total number of parts that we expect to need over the lifetime of a product. In other words, they are parts that we do not expect to reorder ever again and exist only in inventory. Many "all time" parts are simply unavailable from any existing source. Since we determined not to sell independent service organizations parts from inventory, it followed that we would not sell them "all time" parts.

(d) We stated we would charge the list price for the part at the time the order was filled. This was designed to

protect us from the possibility that the cost of a part we had to order from our supplier would rise relative to what we had paid for our own inventory.

(e) We reiterated our existing practice not to sell parts on newly introduced micrographic equipment to firms other than our direct equipment and service customers.

5. Kodak has never applied the policy regarding parts for our older micrographic equipment as strictly as the letter might suggest. In particular, we have not automatically held orders from independent service organizations, we have filled most of their orders for "all time" parts, and we have not charged list prices to independent service organizations.

6. Except for a two to three week period in September 1986 (when the policy first went into effect), Kodak has not held or consolidated orders from companies that were not direct equipment purchasers ("non-users"). In fact, after a review of our inventory of parts on hand, their orders have almost always been filled from our inventories. In retrospect, the letter did not communicate our intentions clearly, for we never intended to put an automatic hold on orders from non-users for parts for our older equipment. Rather, we intended to fill their orders from our inventories if we could, but reserving the right to hold and consolidate their orders if our inventories were insufficient, or might not be sufficient, to meet our own needs.

7. This practice is indicated by my memorandum of September 23, 1986 to Neil A. Farrar, the Manager of CESD's Parts Services department. (The memorandum is

attached to this Declaration as Exhibit 2.) I wrote this memorandum after learning that some parts orders from independent service organizations were going to be held for 90 days before processing, supposedly to implement our policy. Since this was an incorrect interpretation of the policy, I wrote to clarify our intentions, and stated, in part, as follows:

> As the letter sent out indicated, we are in business to support the repair needs of customers who purchase BIS equipment directly from Kodak. Towards that end, we want to have an inventory that does meet this objective in a timely manner. However, as you are aware, we also need to improve our return on assets by reducing our inventory levels, thus turning the inventory more often. Our parts planners need to evaluate the orders that come in from these entities [non-users] to make sure that before orders are shipped, we know we have the stock to support our customers. If there is enough stock, the orders should be processed. If there is not, they should be held.

8. This memorandum correctly states how the policy was actually implemented. The key to it is that proper inventory management should guide the individual decision whether to immediately fill or hold an order from an independent service organization. Thus, whenever we have excess inventory of a particular part, we will fill all orders for that part immediately, including orders from non-users. If parts on hand are low and needed for Kodak's own uses, orders are held pending resupply of the inventory, if possible.

9. In practice, this has meant that non-users have had their parts orders filled with only a minimal delay in

the great majority of cases. That is because, unfortunately for Kodak, our inventories of most parts are substantially larger than they should be to meet our own needs. Thus, we usually decide to ship the parts ordered by non-users immediately so that we can reduce our inventories. Although the review period causes orders from non-users to be delayed a few days or, at the outside, a couple of weeks, there have been few instances where a parts order was held for anything approaching 90 days. When a substantial delay has occurred, it has almost always been due to a serious shortage of the part in question.

10. In fact, in most instances we will even fill a non-user's order for an "all time" part. Often this is because we are overstocked on these parts, but it is also because some of these parts can be reordered. Of all the parts for our older micrographic equipment, the only category of such parts that generally are not sold to non-users are those "all time" parts as to which the maker (either Kodak or another supplier) has scrapped the tools and dies and no alternative supply exists.

11. The plaintiffs claim that Kodak has adopted and applied this policy with the intent to put them out of business. That is not true. We recognize that our parts policy imposes certain costs on independent service organizations, and that plaintiffs would prefer Kodak to bear those costs. But it makes no sense for Kodak to, in effect, subsidize competition against ourselves by bearing parts and inventory costs that ought rightfully be borne by the independent service organizations.

12. Nor is our policy with respect to parts for newly introduced micrographic equipment motivated by a

desire to harm plaintiffs. In the first instance, that policy is motivated by our belief that we can more effectively compete in the micrographic equipment market if we can service our own equipment. The marketing of Kodak micrographics equipment and supplies is enhanced by proper and efficient servicing, and by maintaining regular contact with our customers through our field engineers. Kodak expends enormous resources to assure that our service capabilities are the best in the micrographics industry. We require all of our field engineers to have a minimum of two years training in electronics or its equivalent. We then train each of them extensively. The basic training course for every field engineer lasts a minimum of nine weeks, and then each spends an average of two weeks per year on formal refresher courses and updates. Our annual training budget is over $1.5 million. We spend that money because Kodak's reputation of having the best service organization in the micrographics industry is a key to the success of our equipment business.

13. Plaintiffs also claim that Kodak has applied the parts policy in an arbitrary and discriminatory manner, and even that we have conspired with certain independent service organizations to allocate territories and refuse to deal with plaintiffs. These allegations are all false. Our policy is not the product of any conspiracy, and we have not, by conspiracy or otherwise, favored some independent service organizations over others.

14. I will be the first to admit that we have not always been able to identify each parts order placed by an independent service organization, and that as a result a particular independent service organization may have

been able to buy parts, especially parts for older micrographic equipment, without any restrictions. But when this has occurred, it reflects our inability to police the policy with 100 percent effectiveness at all times, not any intentional discrimination. Of course, when this happens it favors the independent service organizations, not Kodak.

15. Many of our problems in this regard are due to the fact that we have had great difficulty in establishing procedures to distinguish between the many thousands of our direct equipment customers with unrestricted access to parts, and those, like the independent service organizations, to whom we restrict parts sales. At the present time, our procedures are based on an often imprecise effort to identify those firms who are not direct equipment customers and do not have unrestricted access to parts. We refer to them as "Business Equipment Non-Users," or "BENUs." When a BENU is identified, a code is programmed into our parts services computer so that when an order is placed, and the BENU's customer number is entered into the computerized ordering system, a message is flashed which alerts the Customer Service representative that the customer is a BENU.

16. This system has not been satisfactory because to date we have only been able to identify some of the firms which are not direct equipment customers and should be classified as BENUs. As a result, other firms get unrestricted access to parts for older equipment. Moreover, as many independent service organizations have discovered, the system can be evaded entirely by simply using an alias that has not been identified as a BENU. We cannot quantify it, but we believe that many independent

service organizations have obtained parts by using an alias.

17. We are presently working on a new enforcement procedure to correct these problems. It will be based on a customer number, but rather than identifying a BENU, it will identify direct equipment customers who are eligible to buy a part. If the customer is eligible to buy the part, an authorization code will appear on the computer terminal and the order will be honored. Otherwise the order will be cancelled (if the part is for a newly introduced product) or suspended pending a review of our inventory (if the part is for older equipment). We expect to have this new procedure in place in the near future.

I declare under penalty of perjury that the foregoing is true and correct and that I executed this Declaration on August ___, 1987 at Rochester, New York.

_____

Robert A. Lorenson

(SEAL)

July 15, 1986

(Name and Address)

Dear Sir:

The purpose of this letter is to communicate Kodak's practice with respect to sale of parts and publications to outside entities who did not purchase equipment directly from Kodak.

Kodak manufactures and stocks parts at a level carefully planned to meet the repair needs of customers who purchase Business Imaging Systems Equipment directly from Kodak. It is *not* Kodak's business practice to provide

training, publications, tools or spare parts to individuals or firms for use in servicing equipment owned by others.

Consequently, orders received on or after September 1, 1986 from any entity which did not purchase the equipment directly from Eastman Kodak Company will be accepted only if:

- The entity has previously and regularly purchased parts for the same equipment model; and

- The entity understands that orders are not filled from inventory, but are consolidated with orders placed periodically with Kodak's sources of supply. The anticipated lead time for these consolidated orders is 90 days or more.

  Parts we have ordered from our suppliers on an "all time" order basis will be available only to Kodak field personnel and to customers who purchased equipment directly from Kodak and who have been trained to service their own KODAK Business Imaging Systems Equipment.

- The list price (without discount) for parts and publications, as of the time orders are filled, will apply. This price may differ from prices in effect at the time Kodak received the order because order quantities, date manufactured, special handling and other factors may significantly affect the cost of procuring and supplying such items.

You should be aware that, since early 1985, Kodak has not supplied outside entities with any parts or publications

for newly introduced products (such as the KODAK RELIANT Intelligent Microfilmer 1000).

Very truly yours,

Joseph M. O'Brien
Customer Equipment Services

JMO:lat
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KODAK MEMO

September 23, 1986

TO: Neil Farrar
FROM: R. A. Lorenson
SUBJECT: Shipment of BIS Parts to Outside Entities Who Do Not Purchase Equipment Directly from Kodak

On several occasions, we have discussed the interpretation that Parts Services and apparently our parts planners have made of the July 15 letter that we sent to outside entities who do not purchase equipment directly from Kodak. While I recognize that there is a meeting this week on this subject, it is important that you not hold parts orders where there is no justifiable reason.

As the letter we sent out indicated, we are in business to support the repair needs of customers who purchase BIS equipment directly from Kodak. Towards that end, we want to have an inventory that does meet this objective in a timely manner. However, as you are aware, we also need to improve our return on assets by reducing our inventory levels, thus turning the inventory more often. Our parts planners need to evaluate the orders that come

in from these entities to make sure that before orders are shipped, we know that we have the stock to support our customers. If there is enough stock, the orders should be processed. If there is not, then they should be held. While ninety days was mentioned in the letter, unfortunately, I believe the current situation has our average lead time at nine periods which is not a good situation for anyone.

I hope this clarifies any misunderstanding on this subject. Further details should be worked out at this week's meeting.

/s/ Bob

RAL:aqc

cc: C. A. Carson
J. M. O'Brien
D. A. Smith

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, v. EASTMAN KODAK COMPANY, Defendant.	No. C 87 1686 WWS DECLARATION OF EMMETT A. GROSS

I, EMMETT A. GROSS, having been duly sworn, testify as follows:

1. I am employed by Eastman Kodak Company as Manager, Customer Equipment Services, for its Copy Products Division. As such, I have responsibility for the development and implementation of Kodak's business practices with respect to the sale of replacement parts for Kodak's Ektaprint copier-duplicators. In the past, I have also had responsibility for the development and implementation of Kodak's business practices with respect to the sale of replacement parts for micrographic equipment marketed by Kodak's Business Imaging Systems Division.

The facts stated in this Declaration are within my personal knowledge, and if called as a witness I could testify competently to them.

2. In April 1985 I was Field Service Manager for Kodak's Customer Equipment Service Division ('CESD'). As such I participated in a review of Kodak's policies with respect to servicing resold Kodak micrographic equipment and selling micrographic equipment parts to third party service providers. The review was occasioned primarily by reports of a recurring problem relating to previously owned Kodak micrographic equipment which was being resold by brokers and used equipment dealers. These resellers were not associated with Kodak in any way, but they frequently represented to their customers that Kodak would service this equipment under an Equipment Maintenance Agreement ('EMA'). Under an EMA Kodak agrees for a set fee to do whatever is necessary to keep the equipment running properly.

3. The practices of the resellers created two problems for Kodak. First, as with resold copier-duplicators, used micrographic equipment was sold in various conditions, ranging from properly to very poorly maintained. Kodak would therefore be taking an unwise business risk by placing equipment of unknown condition under an EMA, the profitability of which depends on the equipment being in a good state of repair at the beginning of the EMA period. Also, the equipment would be resold on occasion to a customer located far away from a Kodak office, requiring the Kodak Equipment Service Representative to travel much more than is usually the case. The extra travel time would adversely affect the profitability of the EMA.

4. Second, the practices of the resellers created a public relations problem for Kodak. Often when a firm purchased poorly maintained equipment from a reseller, they would blame Kodak for any problems they experienced, not the reseller or the previous owner. It generally did not help to explain that a poor maintenance history was the real problem; most firms took the position that because Kodak manufactured the machine, we were responsible for any problems with it. Even though these firms had not purchased the particular machine from Kodak, they were often existing or potential direct customers. Our image with them was important, and we often ended up putting the machine under an EMA and accepting the adverse financial consequences.

5. On April 12, 1985, John A. Lacy and I sent a memorandum to all BISD District Sales Managers and CESD District Service Managers announcing new practices to deal with these problems. A copy of that memorandum is attached as Exhibit 1. As described in the memorandum, our new policy was that we would not place used equipment under an EMA unless we were first allowed to inspect it and bring it up to current performance specifications, for which we would charge the customer on a time and material basis. The reason for this policy is to prevent Kodak from taking an unwise business risk by placing a machine of an unknown condition under an EMA.

6. At the same time, we also reviewed our practice of selling replacement parts on micrographic equipment. Prior to then no one had focused on the sale of micrographics parts, and we had no formal policy with respect to whom we would or would not sell parts. At that time,

there was a growing recognition throughout the entire company that we needed to improve the management of our physical assets, and that specifically we needed to improve our return on assets. For CESD, this meant reducing our parts inventory, which is the only significant physical asset under our control. In early 1985, we had over $16 million of micrographic equipment parts in stock. Everyone agreed this was too high, so we looked for ways to reduce inventories.

7. One such way was to stop making, buying and stocking parts for the benefit of third party service organizations. These firms had sprung up relatively recently, and were actively attempting to take away service revenues. It seemed foolish to us that we would assist these firms in their efforts to compete against us by manufacturing or purchasing, and then maintaining inventories of, micrographic equipment parts for their benefit. We felt that if these firms wanted to compete against us, they should develop, at their expense, whatever resources they needed to be in business, just as we had done. We did not understand that we had an obligation to assist our competitors and reduce our service revenues.

8. We were also concerned that facilitating the efforts of the independent service organizations would harm Kodak's efforts to compete in the micrographic equipment market. Kodak service has always been, and still is, a large part of what makes Kodak's equipment attractive to customers. (See the Declaration of John A. Lacy.) We were concerned that the proliferation of independent service organizations using technicians not trained by Kodak, not trained as well as Kodak technicians, and not given the continuing training that Kodak

technicians receive, would inevitably result in a lower level of customer satisfaction that rightly or wrongly would adversely affect the customer's perception of Kodak equipment. This was an especially strong concern with respect to our newer micrographic equipment, which was becoming increasingly sophisticated, and, accordingly, required technically sophisticated service. We also wanted to avoid the inevitable buck-passing that occurs when an independent firm services a manufacturer's equipment, *i.e.*, the tendency of the service firm to blame the manufacturer if it is unable to fix something. Of course, that can be very harmful to our relationship with the customer. I felt, as did others, that it made no sense for us to facilitate third party operations that would likely tarnish Kodak's image as the manufacturer of the most reliable micrographic equipment on the market.

9. Accordingly, the April 1985 memorandum announced a new practice with respect to the sale of replacement parts on micrographic equipment. First, we decided that with respect to parts that we had historically sold to anyone, *i.e.*, parts for our older products, we would continue to do so, but not without regard to our inventory. We would require entities that were not direct Kodak equipment customers to place parts orders in advance of the immediate need for the part so that we could place their orders with our suppliers. Second, we decided that we would not sell parts on new micrographic products, beginning with the KODAK RELIANT Intelligent Microfilmer 1000, except to direct Kodak customers. This meant that we would not knowingly sell such parts to independent service organizations.

10. At the time this policy was adopted, there was considerable sentiment for cutting off all parts sales to anyone that was not a direct Kodak customer. We did not do so because we anticipated protests from the independent service organizations, and thought it would be less disruptive to them if we phased in our new policy by refusing to sell parts only on new products. Parts for the products that these firms were already servicing would still be made available, except that they would be required to hold them in inventory, just as we do.

11. The policy with respect to parts for newly introduced micrographic products was implemented shortly after the April 1985 memorandum. However, we never fully implemented the requirement that independent service organizations order parts in advance, and not out of stock. As of February 1986, when I became the Manager of Customer Equipment Services for Copy Products, we were still selling parts for our older micrographic equipment to independent service organizations. CESD's efforts to implement this policy are described in the Declaration of Robert A. Lorenson, who took over responsibility for implementing the micrographic equipment parts policy.

12. I presently have responsibility for overseeing the implementation of Kodak's business practices with respect to selling replacement parts for our copiers and servicing used copiers. Those practices and the reasons for them are described in the Declaration of Michael J. Murray. As Mr. Murray states, one of the reasons for the copier parts policy is the critical role that exceptional service plays in marketing Kodak's copiers. Kodak expends enormous resources to assure that our service

capabilities are the standard of the copier industry, which independent surveys say they are. We require all of our field engineers to have a minimum of two years training in electronics or its equivalent, and we train each of them extensively at our Marketing Education Center in Rochester, New York. The basic training course for every field engineer lasts ten weeks in Rochester, plus an additional five weeks of on-site field training. Each field engineer spends an average of two-and-one-half weeks per year on formal refresher courses and updates. Our annual training budget is nearly $4 million. We spend that money to assure that Kodak's vendor service continues to be recognized as the best in the industry, which is enormously helpful in selling our copiers.

13. The complaint alleges that Kodak conspired with various entities — original equipment manufacturers that make parts for us, customers to whom we sell parts, and selected independent service organizations — to prevent plaintiffs from getting parts. Those allegations are all false. From my involvement in the development of these policies, I know that they are exclusively the product of Kodak's internal deliberations. No original equipment manufacturers, customers or independent service organizations were consulted or contacted with respect to these policies.

I declare under penalty of perjury that the foregoing is true and correct and that I executed this Declaration on August 12, 1987 at Richville, Minnesota.

/s/ Emmett A. Gross
Emmett A. Gross

EXHIBIT 1

April 12, 1985

TO: District Sales Managers, BIS
District Service Managers, CESD

FROM: E. A. Gross, CESD, 3/16/KO (44865)
J. A. Lacy, BIS, 5/7/KO (44536)

SUBJECT: Servicing Used Microfilm Equipment Not Sold by Eastman Kodak Company

There are two concerns which are relevant to both BISD and CESD performance in 1985.

1. Kodak is being requested to provide service on previously owned Kodak microfilm equipment which is being resold by independent equipment dealers. These dealers frequently state that Kodak will place this equipment under Equipment Maintenance Agreements when the customer makes the purchase. Since the condition of the equipment is unknown, and has been used and/or stored under unknown conditions, the risks and the costs are generally much higher to Kodak. Therefore, a special Kodak response to these kinds of situations is required.

2. Some customers are choosing service from third party service providers. While this is a customer's right, Kodak is not required to provide parts inventories, or other support to third party servicers. Those service businesses are free to develop, at their expense, whatever resources they feel are required to be in business. It follows then that traditional support functions developed by Kodak, and paid for through service fees by Kodak service customers, should not be made available to others' businesses.

As a result of these concerns, the following practices will be implemented. (These do not apply to KODAK KOMSTAR Equipment. They have been previously addressed. Refer H. Jones correspondence on that subject.)

Parts will be made available on new products (beginning with the Kodak Intelligent Microfilmer 1000) only to Kodak operating units, government customers, and Kodak customers. This applies just in the United States.

Parts for older products will not be inventoried for third party servicers. Where we have a history of selling the parts to those organizations, we will continue to do so. In the future, we will require orders to be placed in advance, so they can in turn be placed against our suppliers. It is not our intention to ship from inventories that are supported by Kodak customers who purchase services from Kodak. Parts prices to those who are not on EMAs will be adjusted upward in the range of 10% before the end of the year.

In those situations where a customer purchases used equipment from an independent equipment dealer, Kodak will require the product to be delivered for inspection to a location determined by local CESD/BISD management (ie, district office, regional ESC, CESD). The customer is responsible for arranging and paying for transportation to and from the selected location. A price will be published for that inspection in the CESD Price Catalog. Only requests for installation or service for any BISD products not delivered through the standard Kodak distribution channels would normally be covered by these changes.

Upon acceptance by the customer to a non-firm quotation, Kodak will refurbish the equipment if it is deemed practical. Modifications will be added to bring the hardware to current performance expectations at currently established per call rates. If it is not practical to refurbish, the customer will be notified, billed for the inspection, and further Kodak service will be declined. Kodak is not obligated to accept equipment which will be located in geographic areas where service capability does not exist.

After bringing the equipment to current performance levels, which carries no warranties, an EMA must be purchased by the customer. It is not our intention to offer per call service on used equipment. Only if EMAs are not available for the product will the local CESD and BISD manager determine if resources and parts are available to provide continuing service on a per call basis.

The BISD sales organization has the responsibility to notify customers and dealers of used equipment prior to the implementation of the changes to the practices regarding used equipment service availability. They also have the responsibility to resolve customer's complaints regarding the application of these policies.

Implementation of these practices will begin on receipt of price and terms and conditions updates to the CESD Price Catalog (around the end of April). Some of the parts practices will be implemented at a later date as systems and procedural changes are required at Parts Services.

Notice to appropriate parties will take place at the time of planned implementation.

/s/ Tim /s/ Jack

EAG/JAL:mms
0053y

cc: Regional Sales Managers, Business Imaging Systems
Managers, Special Markets
CESD Regional Service Managers
Mr. P. M. Carman
Mr. D. A. Nadeau

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al.,	)	No. C 87 1686 WWS
Plaintiffs,	)	
v.	)	DECLARATION OF JOHN A. LACY
EASTMAN KODAK COMPANY,	)	
Defendant.	)	

I, JOHN A. LACY, having been duly sworn, testify as follows:

1. I am employed by Eastman Kodak Company as Vice President and General Manager, Marketing and Product Management, for the Business Imaging Systems Division ("BISD"). I have been employed by Kodak since 1957. During the last 20 years, a major portion of my professional efforts have been focused on the micrographics business. From 1979 until May 1, 1985, I was National Sales Manager, Micrographics/Information Technology Markets, of a then-existing Kodak division called Business Systems Markets Division. As such, I had overall responsibility for Kodak's sales of micrographics

and other business imaging and information management products and services, including responsibility for developing marketing strategies and programs designed to increase our sales effectiveness. I maintained these responsibilities when, on May 1, 1985, I assumed my present position as General Manager, Marketing, BISD. The facts stated in this Declaration are within my personal knowledge and if called as a witness I could testify competently to them.

2. My Declaration addresses several related subjects. First, I will describe the micrographics and image management products manufactured by Kodak, and the markets in which we compete. Second, I will discuss Kodak's marketing strategy and the significant role that Kodak service has always played in Kodak's efforts to market its business imaging equipment. Third, I will describe Kodak's business practices with respect to selling replacement parts for micrographic equipment and servicing used equipment, and in particular the business reasons for those practices.

The Information and Image Management Industry

3. BISD manufactures and sells business imaging equipment and supplies. This equipment includes, but is not limited to, micrographic equipment such as microfilmers, processors, and reader-printers. This equipment is used to compact an image, capture it on microfilm, store it, and retrieve it. We also manufacture Computer Output Microform ("COM") recorders, which are data processing peripherals that record computer generated data onto microfilm; Computer Assisted Retrieval

("CAR") systems, which utilize computers to locate and retrieve micrographic images; and supplies, such as microfilm, chemicals and paper. Kodak markets and services all of BISD's products itself, and does not utilize dealers, distributors, service agents or the like.

4. I have been asked to define the market or markets in which BISD competes. BISD is a competitor in what is called the information and image management industry. All of our business imaging products serve the same general function: they allow businesses to manage information that is in image form (typically words and data on paper) by capturing and storing it at very high densities, and retrieving it expeditiously as needed. Our products are a substitute for other means to store and retrieve image information, the most important of which is the maintenance of ordinary files of hard copy paper documents. In fact, maintaining hard copy files is the image management alternative that we most frequently compete against, and is utilized to manage the great majority, industry estimates say 95 percent, of images in the U.S.

5. Especially with respect to new customers — those that have not previously utilized micrographics equipment — the key to selling our products is convincing the customer that our equipment is a more cost-effective way to maintain records than traditional paper files. Accordingly, the maximum price that imaging equipment makers can obtain for an integrated system of microfilmers, processers or processing, retrieval devices, service and supplies is effectively restrained by the cost of performing the same image management function using hard copy image management techniques.

6. Of course, Kodak also has many competitors in the sale of imaging equipment, supplies and service. Our major competitors are Bell and Howell, 3M, Minolta, Canon, and Fuji. BISD, under my direction, occasionally attempts to determine Kodak's share of all sales of business imaging equipment. These estimates are based on all available data, including government statistics, competitors' annual reports, trade association publications, consultants reports, and our own sales information. Our most recent estimates are contained in a report we prepared for a presentation to our international managers in May of this year, which is attached as Exhibit 1 to my Declaration. These estimates indicate that in 1986 Kodak's share of all U.S. sales of business imaging products was slightly less than 20 percent. (Kodak's share of worldwide sales was estimated to be approximately 18 percent.)

7. We also attempt to estimate our share of sales for several product groupings. The major groups are "Capture" products, *e.g.*, microfilmers and electronic scanners; "Retrieval" products, *e.g.*, viewers and viewer/printers; "Systems," meaning computer assisted retrieval systems; and "COM," which are the computer output to microfilm recorders previously mentioned. These groupings are not distinct markets since each covers only a component or some components of a full image management system. But we do estimate our share of total industry sales for each grouping, and our most recent estimates are in the report attached as Exhibit 1. We estimate our 1986 U.S. shares as follows:

Capture Products	41.8% of $130.8 million total sales
Retrieval Products	16.7% of $274.3 million total sales
Systems	51.0% of $25.1 million total sales
COM Products	25.7% of $78.1 million total sales

8. BISD is not the monopolist alleged by plaintiffs. With respect to all of its imaging products, Kodak faces strong competition from large multi-national firms like Canon, Minolta, 3M and Bell and Howell. In addition, Kodak's ability to raise prices to monopolistic levels is always restrained by the customer's option to use traditional hard copy file management techniques. Kodak cannot now, nor will it ever be able to, exert monopoly power in the information and image management business generally, or in any assumed equipment market.

9. Plaintiffs claim that Kodak micrographics products are so "unique" that BISD does not compete against other micrographic equipment makers. That is totally false. Kodak's imaging products perform the same functions as and are interchangeable with our competitors' products. While our prices may differ slightly from our competitors', they are very sensitive to — indeed, they are set in consideration of — prices for competitive equipment. To use plaintiffs' term, there is a high degree of price elasticity between our prices and prices for comparable equipment manufactured and sold by our competitors. There are no substantial differences between the marketing strategies of our imaging equipment competitors and our own. In fact, the main marketing strategy for all firms in the industry is to convince the customer that they are better off using imaging equipment instead of

hard copy files. Kodak's imaging products are not a market unto themselves, but are one set of products in a highly competitive market.

10. Plaintiffs claim there is a distinct market for reconditioned or used Kodak micrographic equipment. This is wrong on two scores. First, reconditioned and used micrographic equipment of all makes and manufacturers is available for purchase, so even if there is a reconditioned and used equipment market, it includes many more products than those made by Kodak. Second, reconditioned and used equipment are alternatives to new equipment, and thus sellers of this equipment compete in the broader markets I described earlier.

11. Plaintiffs claim there is a distinct market for servicing Kodak micrographic equipment. That is not true. Service is a component of an imaging system. Any such system must include (a) capture products (e.g., microfilmers), (b) film, (c) processing equipment, (d) retrieval devices (e.g., reader/printers or CAR systems), and (e) service. Service is an essential component because micrographic equipment requires regular maintenance and service. Without service, the customer does not get the basic product: an economical and efficient alternative to hard copy record management.

12. Kodak does not treat service as a separate product or recognize any "markets" for servicing our equipment. Our organizational structure reflects this. Our imaging equipment is developed and marketed by BISD, which is one of several Kodak Business Units. Service is performed for us by our Customer Equipment Service Division ("CESD"), which is not a business unit since it

does not develop or market any products. Rather, CESD provides customer support to Kodak's other business units, and its mission is to enhance their profitability by providing the high level of service that makes the business units' products more attractive. All marketing is done through the business units.

13. In the imaging equipment industry generally, there is no distinct service market. Although in recent years independent service organizations have sprung up, they tend not to service imaging equipment generally, but rather tend to specialize on servicing the equipment of one manufacturer. (Typically this is because the principal of the independent service organization is a former employee of one of the manufacturers.) The imaging equipment industry does not have a well-developed aftermarket like the automobile industry, where thousands of garages, service stations, etc. will service any make of automobile. All of the major imaging equipment makers provide virtually all of the service for their own products.

14. Imaging equipment makers, including Kodak, cannot exploit service as a distinct market. Any attempt to do so would inevitably and adversely affect the company's position in the equipment market. Whether or not from the perspective of an independent service organization service is considered a distinct "market," from the perspective of an equipment manufacturer like Kodak service is an element of a single product sold in the equipment market. Purchasers of imaging equipment decide to invest in that product based on the total costs of employing this technology, including service costs, as compared to the costs of hard copy image management

alternatives. They also understand that the attractiveness of any one brand of imaging equipment is based on the total costs of managing images with that brand, as compared with competing brands. Service costs normally exceed 50 percent of the total life cycle costs of imaging equipment, and neither customers nor equipment manufacturers ignore those costs.

15. Thus, the interbrand equipment market sets both equipment and service prices. If Kodak were to raise its service prices to monopolistic levels, we would undoubtedly experience adverse effects on our equipment sales. Our customers would simply switch to other equipment makers, or they would stop buying imaging equipment altogether. The adverse effects on our equipment sales would outweigh any additional profits we might be able to get on service. In fact, such a strategy would ultimately hurt even our service revenues since future service revenues are heavily dependent on present equipment sales.

16. Recognizing this, we carefully consider the pricing practices of our equipment competitors when we set our service prices. We also explicitly consider the effect that our service prices will have on our equipment sales and on the customers' total costs of managing images. That effect places a cap on the maximum amount we can charge for service.

17. Plaintiffs suggest that we can charge monopolistic prices because our existing customers are "locked in" to Kodak products and service. (Complaint ¶ 28) That is not true. First, our customers, like our competitors' customers, always have the option of switching suppliers,

and that happens often. To encourage switching to their own products, all manufacturers offer attractive trade-in programs to customers. Customers can also sell their equipment to used equipment brokers or dealers. Thus, plaintiffs' claim that a "high capital investment" in equipment locks in customers is false.

18. Second, and of even greater significance, customers can switch suppliers for their *future* imaging equipment purchases. Most customers make continuing purchases of micrographic equipment. Many have purchased their equipment over time (as opposed to all at once), so that at any given time some of their equipment is near the end of its useful life and needs to be replaced. Eventually it will all need to be replaced. Also, as our customers grow they often need to upgrade their equipment or simply buy more of it. This is a major business opportunity for Kodak; indeed, these customers are our best prospects for new sales. If we were to overcharge customers for service, we would prejudice our ability to make these sales. Kodak is in the imaging equipment business for the long term, and we would not prejudice our long term competitiveness by overcharging for Kodak service.

The Role of Service in Kodak's Marketing Strategy

19. The link between equipment competition and service is also evident in the emphasis we place on service in marketing our equipment. Kodak has always emphasized our service commitment in marketing our products. It is a means of distinguishing ourselves from our competitors by adding value to the equipment offering. A good example of the presentation that we make

about service is contained the brochure entitled "Performance Plus: A World of Service From Kodak," that is attached as Exhibit 2 to my Declaration. This brochure, which was prepared by CESD, is frequently given to potential imaging equipment customers. Its opening paragraphs sum up our sales efforts with respect to service:

> more than just equipment
>
> When you acquire Kodak equipment, anywhere in the world, you are getting more than just equipment. An unsurpassed added benefit comes with it. We call this extra advantage PERFORMANCE PLUS.
>
> Outstanding PERFORMANCE from your factory-fresh equipment at the start . . . PLUS continued superb performance as long as you have the equipment in use.
>
> The goal is *optimum productivity for you.* Maximum uptime, minimum downtime. Reliable, high production levels, with high quality. Deadlines met. Nobody kept waiting. High yield from every hour of employee time and every hour of your time. Productivity you can count on, day after day.
>
> superlative service
>
> To meet those Performance Plus goals, an outstanding equipment service capability backs every piece of Kodak equipment You use. You can rely on this resource. Here's why . . .

The rest of our brochure goes on to explain Kodak's service capability in detail, focusing on our advanced service technology, the training of our service technicians, our parts supply network, and the way we build serviceability into our products.

20. Another example of our pitch regarding service is the brochure entitled "Downtime! – How Much Does Poor Service Cost You?" which is Exhibit 3 to my Declaration. This brochure was prepared in 1984 by Kodak's Business Systems Marketing Division. Imaging equipment customers are extremely concerned about "downtime," the period of time when a machine is inoperable because it has malfunctioned or is being serviced. During such periods customers lose all access to vital business documents. We believe that we can differentiate ourselves from our competition and gain a marketing advantage because of the very high reliability of our equipment and our unsurpassed service capability. The "Downtime!" brochure, which is given to many potential imaging equipment customers, addresses this issue by focusing on service. In part, it says:

> You invest in equipment because you want results.
>
> No matter how much that equipment saves you, if it's down, it's useless.
>
> Poor service means *more* downtime.
>
> That's why you should demand — *and should get* — the best service possible. You're entitled to it!

The brochure then describes to the customer in some detail "what you'll get from Kodak service," and it reminds them that:

> Independent surveys show —
>
> Kodak customers consistently rate Kodak service tops in the industry!

Lastly, it succinctly states the relationship between our equipment and service by stating "The Kodak offer:"

- Hardware
- Software
- Systems Design
- Cost Justification
- Service

The point of this last statement is to encourage the customer to believe, as we do, that equipment, supplies and service are all components of a single product.

21. These brochures are not unusual or isolated examples of Kodak emphasizing service to sell equipment. We train our sales representatives to do so regularly. References to service appear in many of our advertisements, especially the fact that independent surveys consistently rate Kodak service as the best available. And we closely monitor our customers' satisfaction with our service to make sure we keep them happy, because that greatly affects our ability to sell more equipment to them in the future.

BISD's Parts Policy

22. I was directly involved in the decision to implement the parts policy that the plaintiffs challenge in this case, and the policy with respect to servicing used Kodak equipment sold by independent equipment dealers or brokers. Those policies were first adopted in 1985 and are reflected in the April 12, 1985 memorandum that Emmett A. Gross and I sent to all of our District Service and Sales Managers. (The memorandum is Exhibit 1 to Mr. Gross' Declaration.) The parts policy provided that with respect to parts that we had historically sold to anyone, *i.e.*, parts for our older products, we would continue to do so, but not out of inventory. We would require entities that were

not direct Kodak customers to place parts orders in advance of the immediate need for the part so that we could place their orders with our suppliers. Second, we decided that we would not sell parts on new micrographic products, beginning with the Kodak Reliant Intelligent Microfilmer 1000, except to direct Kodak equipment customers. This meant that we would not knowingly sell such parts to independent service organizations.

23. With respect to servicing used equipment, the policy imposed conditions on Equipment Maintenance Agreement ("EMA") service. Specifically, we decided that before Kodak would place used equipment under an EMA, we would require the used equipment owner to take it to Kodak for inspection. For a fee, we would then inspect the machine, provide the owner with a non-firm quotation for the repair work needed to bring the machine up to current performance expectations, and perform such repairs if requested to do so. Then, the owner would be eligible for an EMA. We reserved the right not to offer service on equipment located in areas where we had no local service capability.

24. Plaintiffs claim that the parts policy was designed to monopolize a so-called market for servicing Kodak equipment, and that the used equipment policy was designed to monopolize a so-called reconditioned or used equipment market. Neither allegation is true. First, no such markets exist (at the very least we do not recognize any such markets), so we could hardly have intended to monopolize them. But more important, we had valid business reasons for our decisions that had nothing to do with these plaintiffs.

25. With respect to our parts policy, it is Kodak's belief that by taking direct responsibility for all of the components of our product offering, including service, we can increase the reliability of our products and generate the high level of customer satisfaction that is a central part of our strategy for competing in the equipment market. In business jargon, we can "add value" to the equipment. Our imaging products, particularly the newer types and models, are sophisticated and complex, and are becoming more so every day. It is not simple to repair or maintain them properly, and it is becoming more difficult to do so as product complexity (for example, computerization) increases. We spend millions of dollars every year training our field engineers so that they have a thorough understanding of our equipment and the service problems they present. This training is ongoing; our field engineers frequently receive refresher courses or updates on service issues to keep their knowledge current. This makes them the best at what they do, and that translates into customer satisfaction which translates into better equipment sales.

26. Having responsibility for service also allows Kodak to monitor the post-sale performance of our equipment. On a broad scale this allows us to determine if there are recurring problems with the equipment that might require a modification or a technological improvement. When a modification becomes necessary, as frequently happens, we provide it to our service customers at no cost. But servicing their equipment also gives us an insight to a particular customer's experience with the equipment that allows us to head off problems in advance

and protect our image with that customer as a manufacturer of high quality, reliable equipment. Moreover, it keeps the lines of communication with the customer open so that we know their needs, especially their future equipment needs, on an ongoing basis. We frequently make new sales of equipment because one of our field engineers has learned during a service call that the customer is interested in buying, or has a need for, new equipment.

27. When someone other than Kodak services our equipment, we lose these benefits. If not broken completely, the lines of routine communication with the customer are at least damaged. More important, we are convinced that, on the whole, customers will receive poorer service, experience greater downtime, and lose productivity, as a result of which our image will suffer. Independent service firms do not train their personnel as well as we do, and they certainly do not get the continuing education and overall technical support that our field engineers get. That translates into poorer service, which increases the frequency of malfunctions and downtime. It would be naive to think that customers will correctly assign blame to the independent service organization rather than to Kodak when problems arise. There is a natural tendency for customers to blame the manufacturer if there is a problem with the equipment, and that is especially likely if there is an independent service firm in the picture whose personal interests are to deflect blame away from itself. Maintaining single source responsibility for both the equipment and service avoids the "finger-pointing" that regularly occurs when that responsibility is divided.

28. The second set of reasons for our parts policy relates to the costs that we incur as a result of the independent service organizations. These come in two forms. First, these firms take away service revenues that are an important part of the return we expect to receive on our multi-million dollar investment in imaging equipment. We made that investment, and put that capital at risk, expecting a return made up of the aggregate of equipment, supplies, parts and service revenues. We spent millions more developing and maintaining a service organization to support our equipment. The independent service organizations have invested relatively nothing in the business — in fact most of the ones servicing Kodak equipment are former employees that we trained at our expense — and they target the most vulnerable component of the return on our investment. We have no interest in subsidizing their efforts.

29. Second, apart from our basic investment in the industry, providing parts for independent service organizations increases Kodak's inventory costs. This was a key consideration leading to the policy we adopted in April 1985. At that time, Kodak was very concerned with the company's asset management. With respect to BISD, one of the most obvious opportunities to improve our asset management was by reducing CESD's enormous inventories of parts for our products. When a part is held in inventory for a long time, we lose the time value of the money we receive from the sale of that part. Accordingly, proper asset management is to keep inventories as low as possible consistent with being able to service our customers. One step which we decided we could take to reduce our parts inventories was to cut down on our

previous practice of buying and stocking parts for entities which were not our customers, including independent service organizations. We felt that if these firms wished to take service revenues away from us, they should make their own parts and at the very least not expect Kodak to hold parts in inventory for their benefit.

30. Based on all of these considerations, we adopted the parts policy described above. Although we realized that the policy would make it more difficult for the independent service organizations to compete against us, the plaintiffs' allegation that the policy was designed to injure them is not true.

31. The rationale for our policy on servicing used or reconditioned equipment is very simple and self-evident. We did not want to take an unwise business risk by placing a machine of unknown condition under an EMA that would obligate us to do whatever necessary to fix it. We were certainly not trying to monopolize any so-called "reconditioned equipment market," as plaintiffs allege.

32. Contrary to plaintiffs allegations, Kodak never conspired or even consulted with any outside entities in formulating these policies. We did not conspire or consult with independent service organizations, equipment brokers, original equipment manufacturers or any other entities prior to adopting these policies. They are the product of our unilateral decisionmaking, based on the business polices I have described.

33. Finally, Kodak does not tie the availability of Kodak service or parts to the purchase of its equipment. Kodak's customers are free to obtain service from ISOs or to perform their own service; in the latter case they may

freely obtain parts from Kodak. They may also obtain either EMA or per call service from Kodak. The choice is the customer's. Kodak has never refused or threatened to refuse to sell equipment to any customer because they did not want to buy Kodak service or parts.

I declare under penalty of perjury that the foregoing is true and correct and that I executed this Declaration on August 13, 1987 at Rochester, New York.

/s/ John A. Lacy
JOHN A. LACY

* * *

[Exhibits 1, 2 and 3 are lodged separately with the Clerk.]

COPY
McCUTCHEN, DOYLE,
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Eastman Kodak Company

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, v. EASTMAN KODAK COMPANY, Defendant.	No. C 87 1686 WWS DECLARATION OF MICHAEL J. MURRAY

I, MICHAEL J. MURRAY, having been duly sworn, testify as follows:

1. I am employed by Eastman Kodak Company as Vice President and General Manager, Marketing, for the Copy Products Division. I joined Kodak in 1961 and have been employed by the company since then. In 1968, I wrote the original business plan for Kodak's planned entry into the copier business. When Kodak's first Ektaprint copier-duplicator was introduced in 1975, I was

the Western Regional Manager for Kodak's Business Systems Markets Division, and as such was responsible for copier sales in the Western Region. In 1977 I became Kodak's Marketing Director for Copy Products, and for the past ten years I have had principal responsibility for Kodak's efforts to market its copier-duplicators. The facts stated in this Declaration are within my personal knowledge and if called as a witness I could testify competently to them.

2. My Declaration addresses several related subjects. First, I will describe Kodak's role in the copier-duplicator industry, including the types of products we make, our competitors, and the market structure. Second, I will discuss Kodak's marketing strategy and the significant role that Kodak service has always played in Kodak's efforts to market its copier-duplicators. Third, I will describe Kodak's business practices with respect to selling replacement parts for our copier-duplicators and with respect to servicing used copier-duplicators, and the business reasons for those practices.

The Copier-Duplicator Industry

3. I am fully familiar with the copier-duplicator industry in the United States and around the world, including the participants in that industry, their products, and the structure of the marketplace.

4. The basic product of this industry is the plain paper copier, a machine that takes a picture of an image and prints it on a plain sheet of paper. Plain paper copiers are just one of several means to duplicate an image; others include stencils, offset printing, and electronic

non-impact printers. Kodak competes in a broad market for reproducing paper images, and our copier-duplicators compete against offset printing, electronic non-impact printing, etc. However, to simplify matters, I will assume throughout this declaration that plain paper copying is a distinct market, separate and apart from other reproduction technologies.

5. The plain paper copier market is made up of many different vendors selling a wide variety of copier products. The products range from small "personal copiers" that make from 5 to 15 copies per minute ("cpm") and cost a few thousand dollars to large, high-volume duplicators with speeds greater than 100 cpm and which cost upwards of $75,000. Obviously, a $1,000 desk top copier does not seriously compete with a $75,000 high-volume copier. Rather, a customer's particular copier needs lead it to a general level of speed and volume within which it compares the available alternative equipment. For that reason industry participants frequently segment the market in various ways related to the speed of the copier (*i.e.* its copies per minute rating) and its volume (*i.e.* its rating for average monthly copy volume). Market shares are usually calculated both for the industry as a whole and within speed and/or volume segments.

6. In my opinion, it is reasonable to divide the copier industry into three broad segments: low-volume, mid-volume and high-volume copiers. However, the divisions will vary from time to time and are necessarily rough because there is no logical basis for making fine speed or volume distinctions. Customers' needs exist at

every point along the speed/volume continuum. Defining a mid-volume segment is especially difficult since what are called mid-volume copiers in fact compete with both low-volume and high-volume copiers. There is certainly no industry consensus as to the appropriate definition of different segments, and internally Kodak segments copiers into different categories for different purposes. Kodak makes and markets high-volume copiers, and we market two mid-volume copiers that are manufactured for us in Japan by Canon. So we sometimes define "high volume" and "mid-volume" segments. The high volume segment is variously defined as copiers with machine speeds of 60 cpm and greater or 70 cpm and greater, and the mid-volume segment as copiers with machine speeds between 25 and 60 or 70 cpm. We also tend to consider average monthly copy volume, and thus often make calculations based on both speed and volume; for example, a high-volume segment might be defined as machines that copy at greater than 60 cpm and are rated for 25,000 and more copies per month.

7. Obviously, a firm's "market share" of any segment of the copier-duplicator industry will depend on which speed and/or volume criteria are used to define the segment. Moreover, any such share will fail to reflect the fact of competition between segments, in particular the effects that mid-volume copiers have on the adjacent segments. But whether the market is segmented or not and no matter how the market is segmented or defined, it is absolutely clear that there is no copier market in which Kodak is even the largest firm, let alone a monopolist.

8. To illustrate this, I have attached as Exhibits 1 and 2 to my declaration, two memoranda I obtained from

our Business Research Department containing our most recent estimates of market share. Exhibit 1 is a February 10, 1987 memorandum comparing our market share with that of Xerox, our largest competitor. As it shows, we believe that our present market share in the high volume segment (defined as 25,000 or more average monthly volume and machine speed of 70 cpm or more) is approximately 23%, and that Xerox's share is over twice that, 55%. (Most of the remaining 22% of the market is held by IBM.) We believe that our present market share in the mid-volume segment (10,000 or more average monthly volume and machine speed of 25-65 cpm) is approximately 4%. Obviously, we are not monopolists in either the overall market or in either defined segment.

9. Exhibit 2 is a June 30, 1986 memorandum that also analyzes the copier market. As it shows, our market share as of year-end 1984 for all plain paper copiers was less than 2 percent. For copiers with a machine speed of greater than 60 cpm our share was 27.6%, for copiers with a machine speed of greater than 70 cpm our share was 29.7%, and for copiers with a machine speed of greater than 90 cpm our share was 16.6%. Again, Xerox was considerably larger than Kodak in the total market and all segments, and IBM was larger than Kodak in the 60+ cpm and 70+ cpm segments.

10. These figures demonstrate that Kodak is not a monopolist in the plain paper copier market, or in any segment of it. No matter if a high-volume segment is carved out or how that segment is defined, Xerox is the largest firm by a wide margin, with Kodak and IBM trailing behind. In the mid-volume segment, Kodak has a

very small market share in an extremely competitive segment populated by Xerox, Canon, Savin, Ricoh, Sharp, Oce, and other firms. Moreover, there is no possibility that Kodak will become a monopolist in the overall market or either (or any) segment. Japanese firms, led by Canon and Konica, have recently begun producing higher volume copiers, which should lower Kodak's share of the high-volume segment. Even ignoring the Japanese, Kodak could not possibly monopolize a market presently dominated by Xerox, whose name is synonomous with copying, and in which we must also compete with IBM.

11. I understand the plaintiffs claim that Kodak's copier-duplicators are so unique that they are a market unto themselves in which, by definition, Kodak is a monopolist with 100% market share. That is completely false and nonsensical. Kodak's copier-duplicators perform the same basic functions as those manufactured by Xerox, IBM, Canon, Savin, Ricoh and all of the other firms in this industry. There are differences in features between our products and our competitors', but none is substantial and none makes our product the only product that can serve any significant customer group. Our high-volume copier-duplicators are currently manufactured and marketed to compete primarily against Xerox and IBM products, and I have no doubt that their products are manufactured and marketed to compete against ours. Our copiers are priced to compete against other firms making comparable products, and I have no doubt that if we were to raise our prices substantially, we would lose sales to those firms. In selling every one of our copiers, Kodak faces intense competition from many competitors.

12. Plaintiffs allege there is a "market" for reconditioned Kodak copiers, and that Kodak has tried to monopolize it. That is not true. Reconditioned copiers are fully interchangeable with brand new copiers. They perform the same functions and are competitive alternatives to each other. In fact, Kodak sells its reconditioned (we call them "remanufactured") copiers with a new product warranty. Interbrand equipment competition prevents Kodak from exerting market power on sales of any copiers, new or reconditioned.

13. Plaintiffs claim there is a distinct market for servicing Kodak copier-duplicators. Certainly from Kodak's perspective that is not true. Customers cannot and do not consider service as a separate product; service is inevitably a part of the consideration relating to equipment purchases. Indeed, service is of interest to customers only because copier-duplicators require service on a regular basis, both for routine upkeep and to repair malfunctions. Like the design of the product itself, good service is a means of making the product reliable and productive. Without service, the customer does not get the basic product: a reliable method to reproduce documents. Thus, like our products' design and features, exceptional service is part of Kodak's copier-duplicator product offering.

14. In the copier-duplicator industry generally, there is no distinct service market. All of the major copier makers provide virtually all of the service for their own products. Independent service is a very minor phenomenon in the copier-duplicator industry. There are a few independent service organizations, but there is nothing in

the way of a well-developed aftermarket like that in the automobile industry or some other industries.

15. Finally, copier makers, including Kodak, cannot exploit service as a distinct market. If they tried to do so by raising prices or cutting back on quality, they would undoubtedly feel an adverse effect in the equipment market. The attractiveness of any one brand of copier depends on the total costs and benefits of reproducing documents with that copier, as compared with the total costs and benefits of using another copier. Service costs are a substantial part of the total costs, and the manufacturer's service commitment and offering are a major part of the total benefits. Raising the price or reducing the quality of service therefore affects the customer's perception of the attractiveness of one's product, which in a market as competitive as the copier market can mean the difference between making and not making a sale. For that reason, we always make sure that our service prices are competitive with those charged by our equipment competitors, and that they are set at a level that will not adversely affect our equipment sales.

16. Plaintiffs claim that we can charge monopolistic prices because our existing customers are "locked in" to Kodak products and service. (Complaint ¶ 28) That is not true. I believe we have succeeded in engendering a certain amount of customer loyalty because of the quality of our equipment and service, and many of our customers choose to use Kodak copiers exclusively. But there are no particular technological or economic reasons why they must do so. In fact, many firms use copiers from several different vendors at the same time. A copier is basically a

stand-alone piece of equipment. If the customer is dissatisfied with the equipment or it reaches the end of its useful life, it is replaced, and at that time, other than the ordinary advantages or disadvantages to different copiers, there are no substantial advantages to staying with a particular brand. We frequently gain customers which previously used our competitors' copiers, and we frequently lose customers to our competitors. No one is locked-in to Kodak or any other copier maker.

The Role of Service in Kodak's Marketing Strategy

17. When Kodak first entered the plain paper copier industry in 1975, we stressed two points in our marketing strategy. First, we set out to design and manufacture a copier that was more productive than any copier that was then on the market. Primarily, this meant designing a copier that could automate as many parts of the reproduction process as possible, including feeding the document into the copier, copying it, collating it, and, if desired, stapling it. Existing products, we believed, had deficiencies with respect to total job stream productivity.

18. Second, and just as importantly, we wanted to stress a commitment to the highest quality service — better than any service then available on the market. We made a deliberate decision to distinguish ourselves from our competition by stressing our superior service. In fact, this was such a basic part of our marketing strategy that we did not take any orders for copiers in any geographical area until we had in place a complete, thoroughly trained service staff in that area. That strategy of phased entry earned us a lot of criticism from the business media,

which felt that we were too slow in expanding our geographic coverage. But we adopted that strategy because we wanted to build a strong reputation with our customers, which we felt was absolutely vital since we were taking on Xerox and IBM. It turned out to be a successful strategy, and to this day we still do not sell our copiers in some remote areas where we cannot offer our usual service commitment.

19. We continue to stress our service capabilities in marketing our copiers. The most visible evidence of this is the extensive advertising which we undertake to highlight our service capabilities, and the extremely high degree of customer satisfaction that we have been able to achieve with respect to service. For example, we regularly advertise the fact that for the last 6 years, Datapro's Copier User Survey has rated Kodak Ektaprint copier-duplicators number one in the industry in terms of vendor service and copier reliability. Exhibit 3 to my declaration is an advertisement we have been running this year that makes this point. It is entitled "Kodak copiers finish first!" Drawing an analogy to auto racing, it states: "Just as in endurance racing, superior reliability and outstanding service win the copier competition. Kodak copiers finish first in both categories, in an independent survey, year after year."

20. Exhibit 4 is another example of this strategy. It is an advertisement from a campaign in which we touted "The Kodak Advantage." This campaign focused on three elements of our product offering which we feel distinguish us from our competition. They are technology, reliability and service. Exhibit 4 happens to focus on the simplicity of using our copiers, but it includes the lines:

"It's all part of the Kodak Advantage: leading technology, proven reliability and the best service in the business. Reaffirmed by independent surveys, year after year." These advertisements are typical of many advertisements by which we publicize the customer satisfaction we have been able to achieve through outstanding service.

21. Exhibit 5 is a brochure which we distribute to potential customers to advertise our service capabilities. It is one of several we have prepared regarding service, including the "Performance Plus" brochure attached as Exhibit 2 to the Declaration of John A. Lacy. Exhibit 5 is entitled "Service from Kodak. You Can Count On It!" On the cover it shows a customer standing in front of a Kodak Ektaprint 250 Duplicator, and proclaiming "We choose copiers backed by outstanding manufacturer's service."

22. We are confident that our efforts to promote our service capabilities have been successful in distinguishing Kodak from our competition. The results of the Datapro surveys indicate this, and our own internal surveys indicate that the quality of our service is an important reason why customers choose Kodak copiers. It is an especially important consideration to high-volume copier customers. In fact, industry publications that describe the considerations in choosing a copier regularly emphasize the quality and cost of vendor service. Attached as an example is a Datapro article published earlier this year entitled "Selecting a Copier" (Exhibit 6). It states (at page three) that "the final selection of one copier over another should be based on the following considerations: *total cost analysis, serviceability, and ease of operation.*" (Emphasis in original.) It notes that service costs are an important

component of the total cost analysis, and it contains an extensive discussion of vendor service and what a customer should look for in evaluating service offerings. The method of evaluating different copiers that is proposed in this article is, in substance if not in so much detail, used by many copier customers. The emphasis that customers place on service is why to this day Kodak continues to stress good, affordable service as a way of enhancing the attractiveness and competitiveness of its copier-duplicators.

Kodak's Challenged Business Practices

The Parts Policy

23. Plaintiff's primary complaint is against our parts policy. It is Kodak's business practice to sell parts, publications and tools for the repair and maintenance of our copiers only to our direct copier customers who want to service their own equipment. We do not knowingly sell parts, publications or tools to individuals or firms engaged in servicing Kodak copiers owned by others, nor to individuals or firms who wish to service Kodak copiers they have purchased from sources other than Kodak.

24. This parts policy has been in effect ever since Kodak entered the copier-duplicator business in 1975. Since our initial entry, we have marketed all of our copiers, accessories, supplies and service directly to customers, and have not designated dealers, distributors, resellers, or service agents for those products. I note that the Complaint alleges that "[p]rior to July 1985, Kodak . . . sold parts for all Kodak photocopy equipment to plaintiffs." (Complaint ¶ 34) If that is meant to imply that

Kodak sold plaintiffs parts so that they could service Kodak copiers owned by other parties, it is not true. Our parts policy has been unchanged since 1975, and there was no material change in it in July 1985 or at any time close to July 1985.

25. The Complaint suggests that our parts policy is intended to drive the plaintiffs out of business. That is not true. In fact, plaintiffs' allegation does not even make sense since we adopted the parts policy years before there was any such thing as an independent service organization.

26. The actual motivation for the policy is our marketing strategy that a particular level of service commitment is part of the product we sell. Consequently, we made a deliberate decision to provide all copier service ourselves so that we would have complete control over the training of our service representatives and the procedures and methods they would employ to service our copiers. We believed then, as we do now, that by taking direct reponsibility for service we can increase the long-term performance and reliability of our products and thereby generate goodwill and customer satisfaction.

27. We were particularly concerned about the training and competence of our service representatives because of the sophisticated nature of our copier-duplicators. As a general proposition, high-volume copier-duplicators are sophisticated machines requiring a high level of expertise to service properly. But in addition to that, our strategy stressed state of the art technology which naturally increased the need for technically sophisticated service representatives. Beginning with the Kodak

Ektaprint 100 which we introduced in 1975, our copiers have always employed state of the art technology. The Ektaprint 100 was the first copier to use a microprocessor to control machine functions. Our second copier, the Ektaprint 150AF, introduced the recirculating feeder, which revolutionized document handling and sorting. Every copier we subsequently manufactured advanced the state of the art further. Thus, Kodak copiers started out as complex, sophisticated machines, and they have gotten more and more complex over the years.

28. There are other important benefits to controlling the servicing of our copiers. When we provide service we can monitor the post-sale performance of our equipment. We can determine if there are recurring problems with the equipment that might require a modification, and we can spot problems with the equipment before they manifest as a malfunction and thereby protect our image with customers. There is also a direct marketing advantage to providing service since we have continuing information on our customers' future equipment needs. We frequently make new sales of equipment because one of our field engineers has learned during a service call that the customer is interested in buying, or has a need for, new equipment.

29. In addition, we have always believed that non-Kodak service would inevitably be poorer service, resulting in greater downtime, a loss of productivity, and in the end a tarnished Kodak image. Independent service firms generally do not and in my opinion cannot train their personnel as well as we do. They simply do not have the resources. While many such firms are made up of individuals who previously worked for Kodak and therefore

received Kodak training, once they leave us they lose the continuing education and training which keeps their knowledge current. Sooner or later, their knowledge becomes dated if not altogether obsolete.

30. Thus, we do not believe that independent service firms can service our equipment as well as Kodak Field Engineers. That must increase the frequency of malfunctions and downtime. When that happens the customer will inevitably blame Kodak on the theory that the manufacturer is responsible for malfunctions. It is very doubtful that Kodak's image will escape untarnished, especially since the independent service organization has an incentive to deflect the blame away from itself. Maintaining single source responsibility for both the equipment and service avoids the "fingerpointing" that will often occur when that responsibility is divided.

31. The desire to have single source responsibility for service was the reason we adopted the parts policy in 1975, but it is not the only reason we have maintained that policy. The policy has been maintained, in part, because we do not want to encourage and support independent service firms in their efforts to divert revenues that would otherwise be Kodak's. We recognize that these firms have a right to offer service of Kodak equipment if they so desire, but we feel strongly that we have no obligation to foster their efforts by providing them with parts. As things now stand, the plaintiffs want to free ride on the enormous investment Kodak made in designing and manufacturing copiers and copier parts. But that is an investment that we made for the benefit of our customers and ultimately our shareholders. We should not have to give away the rewards from our investment to

firms unwilling to make a similar investment and whose sole business is taking away service revenues from Kodak.

32. Forcing Kodak, or for that matter any equipment manufacturer, to subsidize service firms by providing parts makes it even harder to justify investments in manufacturing than it is today. Service revenues are an important part of the return Kodak expects to receive on investments in designing and manufacturing copiers. It is hard enough to obtain that return when we have to compete against the likes of Xerox and IBM, and it is going to get even harder as the Japanese firms enter the high-volume copier segment. But it is harder still if we are required to provide the fruit of our investment to service firms so they can chip away at our service revenues, the most vulnerable component of the return on our investment. We are not about to encourage the efforts of these firms by reversing a 12 year old policy against selling parts.

The Used Equipment Policy

33. The plaintiffs also challenge our business practice with respect to servicing used Kodak copiers that have been resold by a broker or refurbisher. Our practice is as follows. Since we have no contractual relationship with any resellers, we do not feel obligated to service copiers they sell. However, we choose to do so so long as the copier can be brought up to Kodak performance standards. Accordingly, if asked to service such a copier, we first insist on the right to inspect it, for which we charge a fee. If we can bring it up to our standards we

will do so, but, of course, we will charge the customer for the needed repair work. Then, depending on the age of the equipment, we will put the copier under an Equipment Maintenance Agreement ("EMA") or offer per call service on it. Attached as Exhibits 7 and 8 are copies of two memoranda that I sent out along with Ed Ince, then Manager, CES Copy Products, explaining this policy in detail.

34. The business reason for this policy is simply to protect Kodak from the losses that we would suffer if we put a poorly maintained copier under an EMA. Under the terms of an EMA, Kodak does whatever is necessary to keep the copier running well. Of course, the amount of effort required, and hence the cost to Kodak, varies directly with the condition of the equipment. In 1985, we began to experience problems with brokers who sold someone a used copier promising the customer that we would place the copier under an EMA. Often, the copier was in poor condition because of improper shipping or long periods of storage, and there were many instances when Kodak put such a copier under an EMA and lost money on it. Our response was to require that the copier be brought up to our standards on a straight time and material basis before it went under an EMA. By doing this, we certainly were not trying to monopolize any alleged market for used or refurbished equipment.

35. Finally, contrary to plaintiffs' allegations, Kodak never conspired or even consulted with any outside entities in formulating these policies. We did not conspire or consult with independent service organizations, equipment brokers, original equipment manufacturers or any other entities prior to adopting these policies. They are

the product of our unilateral decisionmaking, based on the business polices I have described.

36. Lastly, the plaintiffs' claims that Kodak ties equipment, parts, and service together are wrong. Kodak does not require that its copier customers buy Kodak service or parts to get our equipment. In fact, customers have the option of purchasing Kodak service (on either a per call or EMA basis) or ISO service, or servicing their own copiers. If they choose to service their own, they may obtain parts from Kodak. Kodak has never refused or threatened to refuse to sell equipment unless the customer agreed to buy Kodak service and parts.

I declare under penalty of perjury that the foregoing is true and correct and that I executed this Declaration on August 13, 1987 at Rochester, New York.

/s/ Michael J. Murray
Michael J. Murray

EXHIBIT I

KODAK MEMO

February 10, 1987

To: R. J. Chenette
From: G. C. Miller, Business Research, CP, 6/16/KO (43051)
Subject: Plain Paper Copier Market Shares

In response to your question regarding the domestic market share of Xerox and Eastman Kodak, please see the attached sheet. The two key market segments are defined for high volume and mid volume areas. The share

numbers are calculated as the percentage of the installed base of machines in the appropriate segments.

The Xerox mid volume numbers for 1987 will increase, based on the strength of their new product, the 1065. It currently has limited availability (in one zone), with national availability scheduled for May. The mid volume market is large and has many vendors, therefore the effect upon Copy Products should be somewhat diminished.

/s/ Jerry Miller

cc: H. L. Blitzer
J. L. Bradley
L. J. Matteson
C. L. Trowbridge

U. S. Plain Paper Copier Market Share

	1985	1986	1987
High Volume Xerox *	55%	55%	55%
High Volume Eastman Kodak	20%	21%	23%
Mid Volume Xerox **	18-20%	18-20%	22-25%
Mid Volume Eastman Kodak	1%	3%	4%

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* HV is 25,000 or more average Copy colume, and machine speed 70 CPM or more

** MV is 10,000 or more average copy volume, and machine speeds from 25-65 CPM. Xerox 1065 Partial year shipments estimated at 15,000 for 1987.

Source Business Research and F and A Copy Products.

KODAK MEMO

EXHIBIT 2

June 25, 1986

TO: K. J. Ludeke
T. P. Moore
M. J. Murray
J. L. Thomas
C. L. Trowbridge

FROM: F. C. Anderson, Market Intelligence-CP, 6/16/KO (43158)

SUBJECT: Market Shares by Vertical Markets

The attached memo was prepared from the COMTEC survey at the request of Bob Leahy. Bob suggested that I provide a copy to you with the hope that you will also find this information to be of use.

Please call if you have any questions.

/s/ Fred Anderson

cc: C. H. Hanlon
G. C. Miller
U. A. Teigman

KODAK MEMO

June 24, 1986

TO: R. A. Leahy

FROM: F. C. Anderson, Market Intelligence-CP, 6/16/KO (43158)

SUBJECT: Market Shares by Vertical Markets

In response to your request for information on the above captioned subject, attached are the following profiles:

- market share by vendor for the total PPC market,
- market share by vendor for the installed base of 60+ cpm PPC's,
- market share by vendor for copiers in the 10K and over, 25K and over, and the 50K and over AMCV levels.

As you mentioned, a few of the vertical markets need to be clarified:

- Transportation and Utilities also includes the communcations industry (television and radio broadcasting).
- Business and Professional Services includes advertising agencies, credit reporting agencies, direct mail firms, employment agencies, news syndicates, computer related services, management consulting firms, engineering companies, and accounting firms.
- Miscellaneous Services includes segments such as nonprofit organizations, social services, and legal firms.
- Health includes all public and private health services.

- Education includes all public and private educational facilities.
- Print-for-Pay includes both quick and commercial printers.

In reviewing this information one point which appears evident is that the education vertical market may present a significant growth opportunity for high volume placements by Kodak.

If I can provide any additional information or if you have any questions, please call.

/s/ Fred Anderson

cc: C. H. Hanlon
G. C. Miller
U. A. Teigman UAT

TOTAL PPC MARKET (YEAR-END 1984)

VERTICAL MARKETS/ INSTALLED BASE	MARKET SHARES							
	% KODAK	% XEROX	% CANON	% SHARP	% SAVIN	% MINOLTA	% IBM	% OTHER
AG, MIN, CONST 159,820 Units	2.1%	27.8%	18.1%	17.2%	5.7%	4.9%	2.7%	21.5%
MANUFAC-TURING 268,415 Units	2.3	24.4	12.1	12.0	8.0	9.6	6.4	25.2
TRANS, UTILITY 153,218 Units	1.4	28.7	15.1	11.2	7.1	4.8	2.7	29.0
RETAIL 201,981 Units	0.1	18.8	12.3	14.7	14.3	10.9	3.3	25.6
WHOLESALE 264,656 Units	1.1	14.5	11.0	16.5	7.0	9.6	2.3	38.0
FINANCE, INSURANCE 341,199 Units	1.4	22.4	16.0	9.7	7.7	7.8	5.5	29.5

BUS/PROF. SERVICE 332,174 Units	1.7	28.3	13.2	14.9	8.4	8.3	3.7	21.4
MISC SERVICES 246,922 Units	0.1	22.9	15.8	19.0	6.6	12.1	1.9	21.6
HEALTH 243,391 Units	0.1	21.7	14.4	14.3	6.9	9.1	1.7	31.8
EDUCATION 217,231 Units	0.3	29.8	10.9	8.9	10.6	5.6	3.8	30.1
GOVERNMENT 152,848 Units	2.0	27.6	11.3	7.3	14.5	6.0	4.7	26.6
PRINT-FOR-PAY 45,887 Units	10.9	18.2	6.6	8.8	5.9	8.4	3.6	37.6
TOTAL UNITS 2,627,741 Units								
% OVERALL SHARE	1.3%	23.8%	13.5%	13.3%	8.5%	8.4%	3.6%	27.6%

MARKET SHARE: 60+ CPM PLAIN PAPER COPIERS
SOURCE: COMTEC YEAR-END 1984

VERTICAL MARKETS	INSTALLED BASE	MARKET SHARES % IBM	% KODAK	% XEROX
AG, MIN CONST	8,714 Units	37.9%	39.2%	22.9%
MANUFACTURING	22,020 Units	35.4	27.9	36.7
TRANS, UTILITY	9,993 Units	21.6	21.2	57.2
RETAIL	1,654 Units	26.2	15.8	58.0
WHOLESALE	4,736 Units	13.3	61.2	25.5
FINANCE, INSURANCE	13,743 Units	38.3	33.8	27.9
BUS/PROF. SERVICE	20,944 Units	25.0	26.2	48.8
MISC SERVICES	3,896 Units	35.4	3.5	61.1
HEALTH	4,553 Units	46.9	7.7	45.4
EDUCATION	14,734 Units	18.6	4.0	77.4
GOVERNMENT	10,383 Units	38.9	29.8	31.3
PRINT-FOR-PAY	8,106 Units	1.9	61.4	36.7
TOTAL UNITS –	123,475 Units			
	% OVERALL SHARE	28.6%	27.6%	43.8%

PPC MARKET: AMCV OF 10,000+

VERTICAL MARKETS/ INSTALLED BASE	MARKET SHARES: 10K+ AMCV % KODAK	% XEROX	% CANON	% SHARP	% SAVIN	% MINOLTA	% IBM	% OTHER
AG, MIN, CONST 18,926 Units	18.1%	22.5%	17.0%	1.8%	5.9%	2.3%	17.5%	14.9%
MANUFAC-TURING 65,647 Units	9.4	27.7	11.6	4.8	8.9	3.2	15.2	19.2
TRANS, UTILITY 34,624 Units	6.1	38.5	11.5	2.6	8.0	3.6	8.2	21.5
RETAIL 15,522 Units	1.7	14.8	14.5	7.2	34.4	2.9	17.5	7.0
WHOLESALE 25,965 Units	11.2	15.6	16.9	5.7	1.4	17.3	5.3	26.6

FINANCE, INSURANCE 48,984 Units	9.5	19.4	11.5	1.1	17.9	4.1	17.7	18.8
BUS/PROF. SERVICE 53,836 Units	10.2	34.4	9.4	16.5	6.4	4.4	10.4	8.3
MISC SERVICES 21,739 Units	0.6	23.6	40.4	8.8	1.8	2.4	8.8	13.6
HEALTH 25,760 Units	1.4	45.2	6.7	3.4	12.4	7.1	10.6	13.2
EDUCATION 79,785 Units	0.7	47.3	6.8	3.8	8.8	3.4	5.7	23.5
GOVERNMENT 47,238 Units	6.6	40.3	9.6	3.4	12.5	2.4	11.1	14.1
PRINT-FOR-PAY 20,092 Units	24.8	21.7	7.4	0.1	2.9	1.3	0.8	41.0
TOTAL UNITS 458,118 Units								
% OVERALL SHARE	7.5%	32.3%	11.8%	5.2%	9.8%	4.3%	10.7%	18.4%

PPC MARKET: AMCV OF 25,000+

VERTICAL MARKETS/ INSTALLED BASE	MARKET SHARES							
	% KODAK	% XEROX	% CANON	% SHARP	% SAVIN	% MINOLTA	% IBM	% OTHER
AG, MIN, CONST 3,618 Units	20.1%	40.8%	1.8%	0.0%	0.0%	0.0%	35.7%	1.6%
MANUFAC-TURING 25,652 Units	23.2	34.2	4.9	1.8	4.5	2.3	18.7	10.4
TRANS, UTILITY 12,389 Units	17.1	56.7	4.6	0.4	3.4	1.5	9.5	6.8
RETAIL 5,491 Units	4.3	18.0	12.8	11.9	7.1	0.0	44.2	1.7
WHOLESALE 10,429 Units	26.5	19.4	14.3	0.0	0.0	27.0	7.6	5.2

FINANCE, INSURANCE 14,551 Units	30.4	25.1	8.0	0.0	4.5	1.8.	21.4	8.8
BUS/ PROF. SERVICE 24,250 Units	20.6	47.3	7.3	0.2	1.4	0.2	21.2	1.8
MISC SERVICES 7,983 Units	1.7	44.3	13.1	11.4	3.0	4.7	15.8	6.0
HEALTH 6,403 Units	5.5	45.6	5.5	0.4	4.1	0.4	29.0	9.5
EDUCATION 27,425 Units	2.1	68.8	3.0	0.1	4.7	7.1	7.1	7.1
GOVERNMENT 16,836 Units	12.4	53.1	6.4	1.2	4.5	0.4	17.6	4.4
PRINT-FOR-PAY 12,244 Units	34.9	30.0	0.3	0.0	0.0	0.0	1.3	33.5
TOTAL UNITS 167,271 Units								
% OVERALL SHARE	17.1%	43.8%	6.2%	1.4%	3.3%	3.8%	16.1%	8.3%

PPC MARKET: AMCV OF 50,000+

VERTICAL MARKETS/ INSTALLED BASE	MARKET SHARES % KODAK	% XEROX	% CANON	% IBM	% OTHER
AG, MIN, CONST 1,412 Units	40.9%	43.9%	0.0%	15.2%	0.0%
MANUFACTURING 11,187 Units	40.5	50.0	0.0	9.5	0.0
TRANS, UTILITY 6,649 Units	22.6	68.8	0.0	8.5	0.1
RETAIL 737 Units	25.5	67.0	0.0	7.4	0.1
WHOLESALE 3,591 Units	72.1	22.1	0.0	5.8	0.0
FINANCE, INSURANCE 6,580 Units	60.8	24.3	0.6	12.7	1.6
BUS/ PROF. SERVICE 11,641 Units	40.9	54.1	0.0	4.7	0.3
MISC SERVICES 3,513 Units	2.4	67.3	12.4	17.9	0.0

HEALTH 3,008 Units	11.6	59.4	11.8	17.2	0.0
EDUCATION 11,411 Units	4.8	91.1	0.0	4.1	0.0
GOVERNMENT 6,483 Units	27.1	59.5	4.9	8.0	0.5
PRINT-FOR-PAY 7,392 Units	57.8	39.6	0.5	2.1	0.0
TOTAL UNITS 73,604 Units					
% OVERALL SHARE	34.2%	56.1%	1.6%	7.8%	0.3%

* * *

[Exhibits 3, 4 and 5 to Declaration of Michael Murray are lodged with the Clerk.]

EXHIBIT 6

Selecting a Copier

No other single piece of office equipment is as familiar and as useful as the office copier. Once installed and operating at peak efficiency, it is usually taken for granted; when not suited to the work load or constantly requiring service and repair, the value of a careful copier selection process is soon realized. It is difficult to imagine an office that could function smoothly without a copier, and with the new features and functions such as color copying, image editing, and multiple magnification ratios, the copier has assumed an even larger role in today's office. Copiers, it is clear, are essential ingredients in the efficient flow of communications in today's office. Since such is the case, the acquisition of a copier requires some careful thought on the part of the customer.

Although price is a major consideration in the acquisition of any office equipment, it should never be the sole factor when selecting a copier. There are a number of other factors that require equal consideration on the part of the customer before a decision is made. Chief among these are determining the customer's specific copying needs, the issue of serviceability, and the cost of equipment and supplies.

SURVEY COPYING NEEDS

A survey of the company's present copying habits is a necessary first step in determining what type of copying equipment is required. A thorough analysis of established copying patterns will indicate who is making copies, how

many copies are being made, where the copying is being done, and what types of documents are being copied. This may be a relatively simple process if the company is small and the solution to the problem is fairly obvious (e.g., the company has outgrown its only small copier, making the demand for copying exceed the capabilities of the unit). In a larger firm, however, the results of such a survey may not only point to the acquisition of newer, more advanced equipment, but may also help to streamline the present copier network by eliminating seldom-used or overly sophisticated machines. In all cases, a well-executed survey will bring to light specific facts regarding copier usage that can be used as guidelines for choosing a copier. Final determining factors include price, machine serviceability, and ease of operation.

A survey of copier usage may begin with an examination of past copier billings going back from six months to a year. Billings can provide an immediate overview of volume levels and shifting usage patterns. In some cases, this study alone will point out such oddities as underused copiers, overly expensive machines, and new units that seem to draw work away from older ones. This billing information also helps indicate what type and size of copiers seem to be most applicable to the particular office. But copier acquisitions should not be based on cost alone; a more definitive study of actual machine usage is useful in determining what type of material is being copied and what can be done to upgrade throughput. Copier monitoring devices or questionnaires may be used to capture this data.

The copier market is currently populated with well over 200 copier models from which to choose. Selecting the

copier best suited for each particular application requires a few preliminary steps to insure that the right machine is acquired. Careful consideration of factors such as the company's specific copying needs, copier technology, and the cost of equipment and supplies can make the acquisition decision easier for the customer. This report provides an in-depth look at these factors and offers guidelines for selecting a copier. To help the user determine specific copying needs, a sample copier usage survey is included at the end of this report.

Copier control and monitoring devices, which are described in Section CD51, supply the reprographics manager with data that can be used to determine departmental chargebacks for copier usage. The information provided includes the identity of the user (department and/or individual), the number of copies made by each user per machine, and, in some cases, the exact cost of copier usage per department or individual. Because such systems indicate who is using specific machines, information regarding usage patterns may also be gleaned from the cost/user data reports. This can be helpful in relocating certain copiers closer to their primary users, thus eliminating some employee travel time (a substantial factor in production schedules).

A complete understanding of *what* is being copied, as well as *by, whom* and *where*, is necessary when it comes to selecting a new machine. Although time-consuming, a user questionnaire is perhaps the most thorough method for tapping into the current and changing needs of copy-making employees. The preferred method for doing this is to have each user complete a form during each trip to the copier. The survey period should last about a month.

The success of the program depends on user awareness and cooperation, and it must be shown that the purpose of the survey is to improve service, not to take it away.

The questionnaire itself should be brief, but complete, and preferably printed on one sheet for easy handling. When applicable, multiple-choice questions, which simplify both the answering of the form and the compilation of the results, should be used. A full-page sample of a copier user questionnaire is provided in this report, covering the following areas:

- **Copier** – The name of the copier model being used.
- **User Name** – The identity of the employee using the copier.
- **User Department** – The department of the employee.
- **Number of Originals** – The number of original documents being copied.
- **Copies per Original** – The number of copies made per original, including test runs and bad copies.
- **Size of Copies** – The copy size generated per original.
- **Type of Original** – The form of the original document (i.e., ledger sheets, standard sheets, magazine/books, etc.) and special materials copied.
- **Special Copying** – The nature of any special copying task (two-sided copying, reduction, enlargement, color, etc.).
- **Inconveniences, Limitations, and Suggestions** – An opportunity for the user to express an opinion on what the company could use in the way of copying capabilities (faster speed, two-sided copying, reduction, enlargement, etc.).

It is possible that the time needed to complete the questionnaire by all copier users is an unattractive proposition

for some facilities. An alternative use of the questionnaire would be to distribute the forms to department heads, who in turn would complete them personally or conduct the surveys in their departments. A departmental meeting could then be conducted to discuss the survey and form a general consensus of opinion. The results, although more general in nature, would take much less time to compile and evaluate.

APPLYING THE SURVEY RESULTS

The results of a questionnaire will clearly define the needs of a company, making the selection of a new copier easier. A copier survey such as the one described would supply the following information:

- **Who Is Copying** – The survey can determine which departments dominate the available copiers and show how far a user must travel to make a copy.
- **How Much Is Being Copied** – Copy volumes per machine and per department are provided, showing which machines are most heavily used and which departments demand the most copier usage. The number of copies made per original is also given, showing the frequency of both long and short copy runs. The total volume figures should also be compared to actual meter readings to determine whether a significant amount of copier misuse (unlogged copying) is taking place.
- **What Is Being Copied** – The size and type of originals most frequently copied is indicated.
- **Special Requirements** – The use, or nonuse, of presently available features (collating, two-sided copying, reduction, etc.) is shown, as well as requests from users for additional copying capabilities.

The fundamental concerns that are covered by the copier survey will greatly narrow the field from which the manager can choose a machine. After compiling the results, four primary copying requirements will have been determined: machine speed; copy size; type of original handling; and the need for special capabilities such as two-sided copying, collating, and reduction. All that remains is an evaluation of the qualified machines, the pricing, and the availability and quality of service supplied by the vendor.

The information gained from a questionnaire program may also be helpful in designing a large-scale copier network within a company. The type of copier to be acquired may depend on the decision to go with a totally centralized reprographics system (high-speed copier/duplicators), a decentralized network of copiers (low- to mid-volume machines), or a combination setup with a central high-volume copy center in addition to satellite copiers for convenient departmental use.

CHOOSING THE EQUIPMENT

Although this report focuses primarily on electrostatic plain-paper copiers, a number of less expensive alternatives are also available. Coated-paper copiers have traditionally been regarded as having lower machine and maintenance costs than plain-paper models. However, this advantage has been whittled down by the growing number of inexpensive, low-volume plain-paper copiers appearing on the scene almost daily. The quality and aesthetic appeal of plain-paper copiers, as opposed to their coated-paper counterparts, has also continued to

prove more popular with users. Although there are a number of such models still being marketed, the coated-paper copier today is virtually a machine of the past.

Thermal and dual-spectrum copiers are suited to offices or departments with occasional copy needs averaging below 500 copies per month. These low-volume units, which require manual feeding of both the original and copy paper, are the least expensive copiers on the market; most models are priced between $150 and $300. If the user is willing to accept a grade of image quality somewhat lower than that available with electrostatic copiers, spirit and stencil duplicators may be employed to produce multiple impressions. These units employ paper masters to produce up to 500 copies (spirit) or 2,500 copies (stencil). Most spirit duplicators range in price from $600 to $1,200; most stencil duplicators are priced between $800 and $3,000.

Factors to consider when choosing the equipment best suited to a user's copying requirements include:

IMAGE QUALITY – The quality and aesthetic appeal of coated-paper copies vastly improved with the introduction of dry-toner imaging systems. It can now be said that many coated-paper units on the market produce images comparable to plain-paper machines. The feel of a dry-toned coated-paper copy is similar in texture to the clay-based paper found in many periodical publications. However, the *appeal* of a certain type of copy paper should not be the deciding factor when selecting a copier. The more pertinent question to ask is, *What is the most acceptable type of copy for the proposed application?* Over the years the standards of quality have increased to make users less

tolerant of so-called bad copies. It is this very insistence on quality that has greatly improved industry copier offerings. But not all copies have to be perfect. It is nonproductive to use a costly, high-speed copier/duplicator for generating interdepartmental memos or file copies; the capabilities of such a copier are wasted on these applications. In many cases, an acceptable copy for basic office reference is merely a legible clone, and many low-cost copiers are available to make them.

SPEED – Coated-paper copiers have speeds of less than 25 copies per minute. Plain-paper copiers, on the other hand, not only comprise the intermediate to high-speed ranges but also dominate the low-volume segment of the market. The plain-paper copier is characterized by intense competition among the copier manufacturers, which has created an abundance of feature-rich machines at all volume levels. As vendors increased the functionality of plain-paper copiers, coated-paper machines experienced a steady erosion of market share.

COST – Most copiers marketed by offshore vendors increased in price during 1986 – some by as much as 16 percent – because of the strengthening of the Japanese yen. Despite these increases, the consumer is still getting a great deal of machine for the money. It is currently possible to purchase a general-purpose plain-paper copier for less than $1,500. Some minicopiers, or personal copiers, are selling for less than $800. Technological advances such as micro-processor control, fiber optics, and single-component toner systems continue to simplify manufacturing procedures resulting in smaller units.

CAPABILITY – Special application features common to copiers of all volume ranges include multiple preset and variable reduction/enlargement copying capabilities, automatic single-sheet document feeding, color copying, and large document copying. The market also offers machines that feature image editing capabilities, so that alternate versions of original documents can be generated.

After the results of the survey have determined the type and capability of the copier needed, the final selection of one copier over another should be based on the following considerations: *total cost analysis*, *serviceability*, and *ease of operation*.

COST ANALYSIS

There are four primary costs associated with copiers – equipment cost; service cost; supplies cost; and operating labor cost.

A copier may be purchased, rented, or leased. A purchased machine has certain advantages over rented and leased equipment. If the product is affordable, money spent is invested into ownership and there are no finance charges. Purchasing more expensive copiers ($5,000+), however, is a relatively recent phenomenon. As soon as a company purchases a particular machine, another more desirable model may appear on the scene. Even though certain bells and whistles can be added to a newer product, an older copier that makes a good copy and suits the general needs of the company is a rather priceless commodity, especially if the company has finished paying for it. Again, if the proper copier is selected, it will be suited

to the present and projected needs for the user, making purchase justifiable.

An alternative to purchasing new equipment is the acquisition of used and rebuilt products. It is not unusual for a manufacturer to offer a factory-renewed model of one of its machines at a savings of perhaps 50 percent under the new model price. Before buying, the user should clearly understand what the manufacturer means by renewed or similar descriptions of used equipment.

Renting a copier eliminates the problem of obsolescence. If a new product becomes available, or if the cost of the rented machine goes up considerably, the unit can be replaced within the limitations of the contract in favor of another, more cost-justifiable machine. Rental plans are generally offered in three forms. Monthly rental carries the higher rate but is usually cancelable upon 30 days written notice. Annual and two-year rental contracts offer lower cost-per-copy figures but entail termination charge penalties for contract cancellations before the rental period is up. Other types of plans include high-volume plans for copiers engaged mainly in multiple-copy runs (50,000+ copies per month range:); average cost rental plans combining the production figures for multiple machines; and multiple copier rental plans for fleet users. If a company anticipates using more than five copiers from a single vendor, the manufacturer may offer multiple-machine purchase and rental packages.

A lease plan for a copier is more expensive than a rental plan, but it allows the user the option of applying a certain amount of the monthly expenditure towards the purchase of the machine at the end of the lease. The exact

percentage of monthly payments which may be applied towards purchase varies from lessor to lessor. The user agrees to pay for the copier over a specified lease period, perhaps up to five years. At the end of the period the vendor allows purchase of the equipment at a certain discount based on the cost of the unit at the start of the lease contract. For a company that desires purchase but is suspicious of possible obsolescence, lease plans provide an alternative between outright purchase and rental. For a more detailed analysis of copier financing, see Report CD09-400-101.

SERVICEABILITY

Copiers require maintenance, and maintenance can be costly; this is one of the hidden expenditures connected to copying equipment. Aside from the cost of supplies and the clearing of minor machine problems such as paper jams, the user must rely on the vendor to perform regular maintenance to keep a machine in top running order. This usually entails an occasional visit by the manufacturer to clean the unit and adjust the toning system, or it may involve the replacement of a photoconductor or worn parts on a regular basis.

The manufacturer should be prepared to specify or even guarantee a service call response time. A same-day response time, in the four-hour range, is definitely preferred. Anything over a day should be carefully scrutinized; the time spent with a broken-down copier is money wasted and office schedules delayed. The response time is naturally dependent on the distance of the vendor's representative from the user. In fact, in

many geographic locations, service availability alone may be a chief determinant when selecting a machine.

The next consideration is the way in which the manufacturer offers machine service. The initial warranty on parts and labor is important. There is generally a period of adjustment following the installation of a copier during which service calls may be necessary to fine-tune the machine and get the bugs out. A 90-day warranty on parts and labor is sufficient to cover these new-installation adjustment visits. Additional copier service and preventive maintenance checks can be on either a per-call or contract basis.

Service on per-call basis is charged by the hour and may or may not include the traveling time of the service representative. Rates within this type of structure can range from $40 to $70 per hour, an expensive proposition for a machine that seems to require an inordinate amount of servicing. It should be kept in mind that as a machine gets older the frequency of maintenance will increase, and service on a per-call basis may prove to be out of the question.

Most companies offer maintenance agreements to the user. This is a contract for a specified period, usually equal to one year or a maximum number of copies, during which the user will receive scheduled visits by a service representative. It is the duty of the service representative to perform normal preventive maintenance, such as replacing photoconductors and worn parts, as well as to respond to emergency calls to correct malfunctions. Preventive maintenance generally includes once-a-month visits. At the end of a maintenance contract

term, it can be renewed for continuing service. Rates may run from as little as $15 per month for a low-end copier to over $300 per month for a high-speed copier/duplicator. The advantage of a maintenance agreement is that it guarantees a certain level of service on a regular basis (which might otherwise be overlooked) and provides a price ceiling on repairs in most instances.

EASE OF OPERATION

It is important that the prospective customer see and test a copier model before making a decision. It is surprising how often the wonder feature of a product doesn't quite carry the same impact during a live demonstration or in practical applications. A copier should meet the full expectations of the user company and provide ease of handling for the operator. Criteria to be aware of during a copier demonstration include the following:

- **Copying Ability** – What type of original is the machine able to copy: text, photos, halftones, fine lines, solid areas? What copy sizes are provided? What is the platen size as related to the minimum and maximum reproducible images? Can the copies be written on with pencil or pen? Can written marks be erased?

- **Speed** – Does the copier require a warm-up at the start of the day? Does it remain in an instant-on mode throughout the day, or does it require subsequent warm-up periods as it is used? What is the first copy time? How do the multiple- and single-copy speeds relate to the typical needs of the prospective user?

• **Controls and Indicators** – Are the operator controls easy to use, and do they provide adequate image control (contrast or exposure dial)? Does the copy quantity selector count down to zero? Is there a resettable digital counter? Can a copying run be interrupted to reproduce a priority document? Is the exposure platen easily used, and is it relatively simple to position an original? Are there any displays or indicators to denote misfeed and/or supply replenishment conditions? How does one change paper size; is it console-selectable or automatic? Is there a microprocessor-supported self-diagnostic system?

• **Supply Replenishment** – Are paper, toner, developer, masters, or other expendables easy to replenish? What is the lifetime for a full load of toner and developer? How many copies can be generated from a full load of paper?

• **Special Features** – If there is an automatic document feeder, is it easy to use and does it handle originals carefully? What are the minimum and maximum original sizes accommodated by the feeder? If the copier provides reduction or enlargement capabilities, does it suit the necessary image size ratios for practical use in the company? Is duplexing performed manually or automatically? Modularity of features and accessories has become a selling point on many machines being marketed today. The ability to add options, when the need arises, adds useful life to a copier. Modular options may include feeders, sorters, large-capacity paper decks or cassettes, and even reduction, enlargement, and duplexing capabilities.

• **Physical Features** – What are the dimensions and weight of the copier? Are the electrical requirements standard, or does the machine require a three-prong plug or higher voltage? In case of a power overload, is the copier equipped with its own circuit breaker? Is the unit mobile? Is a stand/cabinet needed, and if so, what will it cost to purchase this option from the vendor? Does the copier have a work surface? What are the space requirements for the machine? Does the unit emit unpleasant fumes or odors? What is the noise level during operation and while on standby?

• **Reliability** – During the demonstration, did any of the following occur: paper jam or misfeed; over- or undertoning of the copy; damp or singed copies? How does one correct paper jams and imaging problems? What type of circuitry does the copier employ, standard or printed electronic panels/chips?

The time spent in the evaluation process is an investment in future productivity and cost efficiency. Obtaining a copier for actual hands-on testing is the best way to determine if a particular machine is suitable for the copy volume and the environment in which it will be placed. Actual experience combined with the other copier selection considerations – needs of the company, preferred technology, cost, and serviceability – should guarantee that the copying equipment obtained will fully meet expectations and anticipated demands.

Selecting a Copier

COPIER USAGE SURVEY

Please answer the following questions regarding each trip to the copier. The results will be used to improve copying facilities within the company.

COPIER _____
USER NAME _____
USER DEPARTMENT _____

NUMBER OF ORIGINALS COPIED _____

NUMBER OF COPIES PER ORIGINAL:

Original 1 _____ Original 5 _____
Original 2 _____ Other Originals (List): ____
Original 3 _____ _____
Original 4 _____ _____

TYPE OF ORIGINALS (Check):

Typed Sheets.....[ ] Magazine/Book Text....[ ]
Ledger.....[ ] Magazine/Book Text
Invoice.....[ ] & Photo.....[ ]
Check.....[ ] Other Types (Specify):____
Drawing.....[ ] _____
Photo.....[ ]

USE OF ORIGINALS
SIZE OF COPIES (Check):

5½" x 8½".....[ ] 11" x 17".....[ ]
8½" x 11".....[ ] Other Sizes (Specify): ____
8½" x 14".....[ ] _____

SPECIAL COPYING (Check):

Two-Sided Copies.....[ ] Labels.....[ ]
Multipage Sets.....[ ] Transparencies.....[ ]
Reduction Copies.....[ ] Other (Specify): _____
Duplicator Masters.....[ ] _____
Enlargement.....[ ] _____

INCONVENIENCES, LIMITATIONS, & SUGGESTIONS:

_____

EXHIBIT 7

August 5, 1985

TO: Regional Sales Managers, Copy Products
Regional Service Managers, Copy Products
District Sales Managers, Copy Products
District Service Managers, Copy Products

FROM: Ed Ince, Manager CES Copy Products, 3F/B16, KO, X42986 Mike Murray, General Manager, Marketing Copy Products, 5F/B10, KO, X44882

SUBJECT: Copiers Purchased from Third Parties/Third Party Service

As the number of Ektaprint copiers which are purchased by our customers increases, so will the number of copiers sold by customers to equipment brokers and other third

parties. Another area of interest as our population of sold copiers grows is the appearance of third party service organizations.

This letter is to familiarize you with our current business practices as well as provide you with specific guidelines for dealing with these situations.

Broker-Sold Equipment

As Kodak has no contractual relationship with brokers or any control over their use of equipment, we have no obligation to them regarding service of the copiers.

It is our desire, however, to offer EMA's on those units which can be brought up to Kodak's operating standards, meet Kodak's published site specifications and fall within the geographic locations where we provide service. The attached guidelines and price schedule will provide the details necessary for handling an Ektaprint copier purchased from a third party.

Third Party Service Organizations

These firms may approach either Field or Main Office personnel to purchase parts, tools or service literature or to be included in service training courses. The current business practice of Copy Products is to make all necessary parts, tools, training and service literature available at established prices to direct Copy Product customers of Kodak who want to service *their own copiers*. We do not honor requests from individuals or firms for resources necessary to service copiers owned by others. We have

also attached guidelines for your use in handling inquiries regarding third party service organizations.

It is important that we be consistent in our communication and implementation of the attached guidelines. If you do have any questions or if unusual situations develop, please call Lynn Brockmann, CES Copy Products, Service Planning, at extension 41446 for consultation before responding. Many thanks for your cooperation on these subjects.

/s/ Ed /s/ Mike

las
Attachments

0930I

cc: Regional Field Service Managers
Regional Operations Service Managers
Zone Sales Operations Managers
Equipment Service Center Managers
Copy Products Management Council

Copy Products Distribution Supervisors
CESD Council
R. Bern/R. Vukosic
F. Booth
B. Mathewson
J. Secker

8/85

Guidelines for Handling EKTAPRINT Copiers
Purchased from Third Parties

- When possible our communications should be directly with our prospective customers, not with third party vendors.
- No written or oral statements attesting to the condition of any copier about to be obtained by a broker or new user should be made by any Kodak representative.

- We are under no obligation to service a unit sold by a third party vendor, although we may choose to do so.
- If a prospective customer calls CESD requesting service on a unit not identified in SCAN, the DSR should set up a dummy customer record and dispatch an ESR to conduct a pre-installation inspection.
- We should only service a unit purchased through a third party vendor after inspecting the equipment and upgrading the unit to Kodak's standards.
- A flat rate pre-installation inspection fee (see attached price schedule) will be charged to the prospective customer through a special billing in SCAN to determine what changes to the equipment are required before agreeing to service the unit on a per-call or EMA basis. The pre-installation inspection fee covers labor, travel time and the cost of a starter kit which should be obtained by local CESD through local Distribution prior to the inspection.
- Time spent by ESR in pre-installation inspection activity should be reported against purpose code PRE. This will cause the call to be referred to the DOC for special billing. DSR in charge of billing should use attached rate schedule for reference when performing the special billing.
- A full installation is not required to perform the inspection as long as Image Quality and operational function can be evaluated.
- An estimate for the additional repair work should be generated by a Service Manager and presented to the prospective customer for approval. This estimate is non binding, therefore, the actual cost to perform the repairs and complete the installation may vary from the estimate.
- If local CESD determines that the equipment cannot be repaired locally because excessive labor or parts are required, the equipment should be sent to an ESC for remanufacturing.

- The actual repair work resulting from the inspection should be charged to the prospective customer (not a third party vendor) according to the current per-call rates through SCAN.
- Inspection and repair will only be performed if the prospective customer's site meets Kodak's published site specifications and is within an established Copy Products marketing/service area.
- The copier must be installed at the site of the prospective customer requesting the inspection, not at a third party vendors site.
- Local Distribution should be notified as soon as the location of a copier purchased from a third party vendor is known to either Marketing or CESD. A mainframe serial number, customer name and new address should be provided to Distribution.
- Local Distribution will then contact Operational Support in Rochester who will update Kodak Office systems with the new owner and location of the machine.
- If the prospective customer requests an EMA and the appropriate inspection and repair takes place by CESD . . .

  1. approval in writing by CESD is required.
  2. the CPSR should complete the EMA acceptance form.
  3. both documents should be forwarded by CESD or Marketing to Regional Distribution who will send them to Operational Support in Rochester.

- EMAs are not assignable (transferable to other customers).
- EMA availability (after inspection and necessary service or remanufacture) for the copier is calculated as follows:
- As indicated in the current CESD Price Book and Marketing price schedule, Kodak will make available

Equipment Maintenance Agreements (EMAs) for purchased equipment as listed below:

New equipment – Seven years from original warranty expiration date.

Remanufactured equipment – Seven years from original warranty expiration date.

Equipment Converted from Rental to Sale – Five years from date of original purchase or seven years minus rental time, whichever is greater.

Equipment from Per-Call Service – Remaining period of availability based on the original class of sale (new, remanufactured, Rental Into Sale). (See Remanufacturing Policy in the CESD Price Book or Marketing price schedule.)

- According to our *current* terms and conditions, if the copier is beyond the initial period of availability as determined by its date and method of purchase from Kodak, the copier can only be offered an EMA on an annual basis at the current EMA price plus 10% per year.
- If a broker or prospective customer requests that CESD prepare a unit for removal from the *original* customers site, we should comply with these requests based on the understanding that:
  1. The broker or prospective customer arrange and pay for the transportation of the equipment.
  2. The broker or prospective customer sign a waiver form stating that the broker or prospective customer, not Kodak, is responsible for any damage incurred during the move.
  3. The original customer will be charged a flat rate removal preparation fee (see attached price schedule) through a special billing in SCAN which will include the labor to package the machine, travel time, and the removal kit, which should be obtained by CESD through local Distribution.

- Removal kits will not be sold to any customer regardless of the origin of the copier.

Price Schedule For Equipment Sold By Third Parties*

August, 1985

Pre-Installation Inspection Fee	
Kodak Ektaprint 100/150 copier-duplicator	$250
Kodak Ektaprint 100P/100F/150P/150F/200F/225F copier-duplicator	375
Kodak Ektaprint 100PS/100AF/150PS/150AF/200AF/225AF copier-duplicator	495
Kodak Ektaprint 250F duplicator	515
Kodak Ektaprint 250AF duplicator	640
Kodak Ektaprint 250AFB duplicator	740
Kodak Ektaprint continuous forms feeder	115

Removal Preparation Fee	
Kodak Ektaprint 100/150 copier-duplicator	$250
Kodak Ektaprint 100P/100F/150P/150F/200F/225F copier-duplicator	375
Kodak Ektaprint 100PS/100AF/150PS/150AF/200AF/225AF copier-duplicator	495
Kodak Ektaprint 250AF duplicator	515
Kodak Ektaprint 250AF duplicator	640
Kodak Ektaprint 250AFB duplicator	740
Kodak Ektaprint continuous forms feeder	115

*to be included in the CESD Price Book in the near future.

These fees should be charged through a special billing in SCAN. If a customer number is not established at the time of dispatch, the call will go on hold and refer until the customer master is updated by Distribution and SCAN is updated with the new customer master.

8/85

Guidelines for Responding to Inquiries Regarding Third Party Service Organizations

- Since we entered the copier marketplace in 1975, we have marketed our Ektaprint copiers, accessories, supplies, and equipment service directly to customers and have not designated dealers, distributors or resellers for those products and services. Kodak has developed tools, training programs, service publications, service parts and technical support for the sole purpose of providing high quality equipment service to our direct customers.

- It is not our business practice to provide training, publications, tools or service parts to individuals or firms for use in servicing Ektaprint copiers owned by others or obtained from sources other than Kodak.

- While we recognize the right of others to compete freely with us in the marketplace, we do not feel any obligation to assist potential competitors by providing training, publications, tools, service parts or technical support.

EXHIBIT 8

KODAK MEMO
ADDENDUM TO AUGUST 5, 1985 LETTER

October 18, 1985

TO: Regional Sales Managers, Copy Products
Regional Service Managers, Copy Products
District Sales Managers, Copy Products
District Service Managers, Copy Products
Market Managers, Copy Products
Service Managers, Copy Products

FROM: Ed Ince, Manager CES Copy Products, 3F/B16, KO, X42986
Mike Murray, General Manager, Marketing Copy Products, 5F/B10, KO, X44882

SUBJECT: Guideline changes for equipment purchased through third parties

In response to questions and suggestions that have arisen since our August 5 letter, this addendum will provide you with our current business practice as well as updated guidelines for dealing with KODAK EKTAPRINT Copier-Duplicators purchased from third parties. The business practice and guidelines provided on Third Party Service Organizations remain unchanged.

BUSINESS PRACTICE

As indicated in our August 5 letter, Kodak has no contractual relationship with brokers or any control over their use of the equipment. We also stated that we have no obligation to them regarding service of the copiers, however, it is our desire to offer EMA's on those units which can be brought up to Kodak's operating standards,

meet Kodak's published site specifications and fall within the geographic locations where we provide service.

We have made an adjustment to this business practice. Our revised business practice is to offer EMA contracts at the current EMA prices on units purchased from a broker (during the initial period of EMA availability) that have been previously covered by an EMA. It is understood that this only applies to units that meet Kodak's published site specifications and fall within the geographic locations where we provide service. Any work done to the unit to make it operational before offering an EMA will be absorbed by the receiving CESD District.

If a unit is per-call, Kodak will continue to provide service at the current per-call rates as long as they also meet site specs and fall within the geographic locations where we provide service. A pre-installation inspection is no longer required for per-call.

The attached guidelines will provide the details necessary for handling an Ektaprint copier purchased from a third party. As previously mentioned, it is extremely important that we be consistent in our communication and implementation of the attached guidelines. If you do have any questions or if unusual situations develop, please call Lynn Brockmann, CES Copy Products, Service Planning, at extension 41446 for consultation before responding. Many thanks for your cooperation on this subject.

/s/ Mike /s/ Ed

Attachments

c: Regional Field Service Managers
Regional Operations Service Managers
Zone Sales Operations Managers
Equipment Service Center Managers
Copy Products Management Council
Copy Products Distribution Supervisors
CESD Council
G. Booth
B. Mathewson
J. Secker
R. Vukosic

10/85

ADDENDUM TO 8/8/85 LETTER

Updated Guidelines for Handling EKTAPRINT Copiers Purchased from Third Parties

- NO WRITTEN OR ORAL STATEMENTS ATTESTING TO THE CONDITION OF ANY COPIER *ABOUT TO BE* OBTAINED BY A BROKER OR NEW USER SHOULD BE MADE BY ANY KODAK REPRESENTATIVE.
- When possible our communications should be directly with our prospective customers, not with third party vendors.
- If a prospective customer calls CESD requesting service on a unit not identified in SCAN, a Service Manager should evaluate the situation based on the conditions outlined in this package and dispatch an ESR accordingly:
- When a prospective customer purchases a KODAK EKTAPRINT Copier-Duplicator from a third party, they will usually fall into one of the following three categories, each having unique guidelines for Kodak field personnel to follow:

EMA TO EMA

If the unit has been previously covered by an EMA, and the prospective customer is requesting that their unit also be covered by an EMA:

1. A pre-installation inspection is required to determine if any *transportation or storage* damage has occurred. This inspection will be charged to the prospective customer through a special billing in SCAN. The pre-installation inspection fee covers labor, travel time and the cost of a starter kit which should be obtained by local CESD through local Distribution prior to the inspection.

   Time spent by ESR in pre-installation inspection activity should be reported against purpose code PRE. This will cause the call to be referred to the DOC for special billing. DSR in charge of billing should use the rate schedule from the 8/5/85 letter for reference when performing the special billing. (rate schedule to be published in CESD Price Book in the near future)

2. If transportation or storage damage is detected, and CESD can repair the damage, the customer will be charged at per-call rates. An option the customer has is to report damage to the broker who may file a claim with the responsible carrier. If the unit has undergone extensive damage during transit or storage, and CESD is unable to repair the equipment, an EMA should not be offered, and the customer will have to resolve the issue with the broker.

   If no transportation or storage damage is detected, there should be little or no work required to make the unit operational. Therefore, we will offer the prospective customer an EMA at the current EMA prices (as long as they are still within their initial period of EMA availability) provided that:

   a. The unit was relocated to the current site no more than 60 days since it was removed from the last customer's site.

   b. There has been no usage on the equipment since it was removed from the previous customer's site (compare current meter reading to removal meter reading).

   c. There has been no unusual damage (as defined by Kodak) to the equipment.

   If the above three conditions are not met, CESD will charge the customer per-call rates to bring the unit up to Kodak's operating standards.

   If the unit is past the initial period of EMA availability, an EMA extension may be offered on an annual basis after inspection and remanufacturing (remanufacturing is only performed if deemed necessary by Kodak), at customer expense. Cost will be the current EMA cost plus 10 percent for each year past initial availability.

PER-CALL TO PER-CALL

If a unit was serviced by Per-call service and the prospective customer wants to continue service coverage as a Class D customer:

1. A pre-installation inspection is not required.

2. Business as usual for a Class D customer. Charge the customer for parts and labor according to our current per-call rates.

PER-CALL TO EMA

If a unit was serviced under Per-call and the prospective customer requests EMA coverage:

> Business as usual for conversion from Per-call to EMA. Follow the current terms and conditions outlined in the Marketing Price Schedule, and/or CESD Price Book.

The following guidelines apply to any unit purchased from a third party vendor:

- The prospective customer's site must meet Kodak's published site specifications and is within an established Copy Products marketing/service area.
- The copier must be installed at the site of the prospective customer requesting the inspection, not at a third party vendor's site.
- Local Distribution should be notified as soon as the location of a copier purchased from a third party vendor is known to either Marketing or CESD. A mainframe serial number, customer name and new address should be provided to Distribution.
- Local Distribution will then contact Operational Support in Rochester who will update Kodak Office systems with the new owner and location of the machine.
- If a broker or prospective customer requests that CESD prepare a unit for removal from the *original* customers site, follow the guidelines outlined in the 8/5/85 letter.

- Removal kits will not be sold to any customer regardless of the origin of the copier.

Supreme Court, U.S.
FILED
JUL 31 1991
OFFICE OF THE CLERK

No. 90-1029

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, d/b/a G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, d/b/a MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; and CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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VOLUME II, PAGES 236-469

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, v. EASTMAN KODAK COMPANY, Defendant.	No. C 87 1686 WWS JOINT STATUS CONFERENCE STATEMENT Date: September 11, 1987 Time: 11:00 a.m.

Plaintiffs Image Technical Services, Inc., *et al.*, and defendant Eastman Kodak Company jointly submit this Status Conference Statement in compliance with Local

Rule 235-3 and the Court's Order Setting Status Conference.

1. Jurisdiction and Service

The Court has subject matter jurisdiction over this action. However, defendant's pending motion for summary judgment requests that if the Court dismisses plaintiffs' federal antitrust claims, it decline to accept jurisdiction over pendant state claims. Kodak is within the personal jurisdiction of the Court and has been properly served. No other service is outstanding.

2. The Substance of the Action

Plaintiffs' Position: This action involves antitrustclaims by 18 companies from 10 states around the United States, who are suing the Eastman Kodak Company as individual plaintiffs. The substance of the action centers around the policies, practices and acts of the Eastman Kodak Company with regard to the sales and servicing of photocopy and micrographics equipment. Plaintiffs are independent service organizations which service Kodak micrographics equipment, or reconditioners and/or brokers of such equipment. The principal policies, practices and acts complained of involve Kodak's preventing plaintiffs from obtaining parts for repair of Kodak photocopy and micrographics equipment; and, Kodak's restrictions on parts and service for machines not purchased directly from Kodak. Plaintiffs' causes of action in the complaint are:

1) Tying of parts to Kodak service and equipment, and of service to the equipment, under Sherman Act § 1 and Clayton Act § 3;

2) Monopolization of the parts and service market, and of the reconditioned and used Kodak micrographic and photocopy equipment markets under Section 2 of the Sherman Act;

3) Attempts to monopolize service, parts and resale of used Kodak photocopy and micrographics equipment under Section 2 of the Sherman Act;

4) Combinations, contracts and conspiracies in restraint of trade and combinations and conspiracies to monopolize in violation of the Sherman Act §§ 1 and 2 involving Kodak's policies, practices and acts to prevent OEM manufacturers from selling parts for Kodak photocopy and micrographics equipment to plaintiffs and to prevent plantiffs from purchasing such parts from other entities to whom Kodak does sell such parts;

5) Related claims for breach of contract, fraud and violation of state antitrust and unfair competition laws based upon the facts which support the Federal antitrust claims above.

Defendant Kodak, as set out in its motion for summary judgment, defends on a number of grounds, including Kodak's right to unilaterally determine with whom it will deal and on what terms, disputes the definition of relevant markets and plaintiffs' "lock-in" theory, and denies that there is a factual basis for the claims of contracts, combinations and conspiracies.

Defendant's Position: This case reduces to the following. Kodak manufactures copiers and micrographic equipment. It sells that equipment in competition with the likes of Xerox, IBM, Bell and Howell and numerous Japanese firms, and by no means is a monopolist. Kodak also sells replacement parts and service needed to keep the equipment running. Plaintiffs purport to compete with Kodak by offering to service the Kodak equipment owned by Kodak's customers. Plaintiffs demand that Kodak provide them with the replacement parts they need to service Kodak equipment; they won't make their own parts or buy them from somebody else. But with some exceptions, Kodak's policy is not to sell them parts because it is burdensome to do so and Kodak does not want to support plaintiffs' free-riding.

Kodak believes that the fundamental issue presented in this action is one of law: may an equipment manufacturer like Kodak, which lacks market power in the relevant equipment markets, unilaterally decide for its own business reasons not to sell replacement parts to independent service organizations? Kodak submits that *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987), *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (9th Cir. 1983), and *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972), unequivocally establish that it may do so.

This point of law is the foundation of Kodak's recently-filed motion for summary judgment. The only factual issues material to the motion are (1) the substance of Kodak's policies and (2) whether Kodak faces interbrand equipment competition that restrains its ability to charge monopolistic prices for service. Neither issue

should be disputed. Kodak's policies are what they are, and the existence of intense interbrand competition in both the copier and micrographics industries is obvious to anyone familiar with those industries. However, plaintiffs intend to dispute both issues and have indicated a desire to take broad, essentially unlimited discovery. Kodak objects to that and suggests that limitations on discovery be set at the status conference.

3. Identification of Issues

Plaintiffs' Position: The primary disputed legal issues regard the extent to which Kodak can, in its policies, practices and acts, refuse to sell parts to plaintiffs, prevent plaintiffs from obtaining parts, and exercise control over replacement parts and service for Kodak photocopy and micrographics equipment and used equipment.

The factual issues in dispute involve primarily issues regarding the actual practices and acts, not the policies of Kodak. Kodak, in its summary judgment motion, has with minor modifications, admitted that its policies are as stated in the Complaint. Plaintiffs contend the practices and acts of Kodak, including tying, monopolization, and combinations, contracts and conspiracies go beyond the stated policies which Kodak admits. Kodak disputes this.

Defendant's Position: The factual issues dispositive of this action are (1) the substance of Kodak's policies and (2) whether Kodak faces interbrand equipment competition that restrains its ability to charge monopolistic prices for service. Plaintiffs apparently intend to dispute Kodak's statement of these facts as contained in the pending summary judgment motion. Kodak believes that the

additional factual issues identified above by plaintiffs have been manufactured in order to evade the rule of *Dimidowich, Calculators Hawaii* and *Bushie*. Discovery should not be allowed on those issues unless plaintiffs can first come forward with a viable theory relevant to any proposed discovery and then make an offer of proof establishing cause to belief that discovery would be worthwhile.

4. Narrowing of Issues

Plaintiffs' Position: The summary judgment motion has been filed by defendant Kodak. This motion seeks to narrow substantially or dispose of issues in the case, including all antitrust issues. Plaintiffs do not agree that the issues can be narrowed by the summary judgment motion.

Defendant's Position: Kodak filed the pending summary judgment to dispose of or, at the very least, narrow the issues in this case and the attendant discovery. Until receiving plaintiffs' statement of anticipated discovery yesterday (included herein as Item 6), we thought we were at least making progress toward the latter goal. On August 28, the parties filed a stipulation with the Court stating their intention "to meet and confer to establish a *specific* discovery program with *particular reference* to those issues identified by the defendant's summary judgment motion." And the parties agreed that Kodak's motion "defines specific issues which may narrow the scope of this case." But quite frankly, plaintiffs' current position breaches those agreements and seems designed

to derail the process of narrowing the issues that was initiated by Kodak's motion.

When the parties met to establish the specific discovery program contemplated by their August 28 stipulation, plaintiffs proposed the broadest discovery program imaginable within the parameters of this case. That is evident from plaintiffs' response to Item 6. Plaintiffs expressly refused, for example, to identify specific conspiracies of which Kodak was or is allegedly a party, and instead fell back on the same sort of generic conspiracy allegations found in the complaint. Plaintiffs won't name any specific conspirators (except Kodak, of course), and their generic allegations capture *all* of Kodak's parts suppliers and customers. Similarly, two more of the "specific" areas that plaintiffs state they wish to take discovery on are "attempted monopolization of service" and "attempted monopolization of used equipment." The narrative descriptions of those subjects are even broader than the catch-all titles.

Kodak believes that the issues in this case can be — and were — substantially narrowed by the pending summary judgment motion. That motion laid out everything that is truly material to this case under the pertinent authorities. If plaintiffs wish to expand the issues, and clearly they do, they have the burden of coming forward with both a viable theory for expanding them and a preliminary offer of proof demonstrating that there is some likelihood the necessary discovery will be worthwhile. We thought plaintiffs had agreed to do that in this status conference statement. When they did not, we asked again that they do so. Plaintiffs still refused. Plaintiffs should now be required to make that showing at the

status conference so that the Court can set specific parameters of discovery and adjust the summary judgment briefing schedule as appropriate. If plaintiffs are unable to make an adequate showing, discovery and all further proceedings should be limited to the two dispositive issues as identified by Kodak's summary judgment motion: the substance of the challenged-policies and the existence of interbrand equipment competition.

5. Relief

Plaintiffs seek temporary and permanent injunctive relief which would require Kodak to make parts available on a uniform basis to all customers, whether competitors or non-competitors, to make service available on a uniform basis to photocopy or micrographics equipment owners whether the machines were purchased from Kodak or a competitor and to prevent the practices and acts involved in the alleged contracts, combinations and conspiracies which stop third parties from supplying Kodak photocopy and micrographics parts to plaintiffs.

Additionally, monetary damages, based on the business losses of plaintiffs as a result of their inability to obtain parts and/or service for Kodak photocopy or micrographics machines will be sought. A damage study, showing the amount of these damages as to each plaintiff will be developed after sufficient discovery has taken place.

6. Discovery

Plaintiffs' Position: Plaintiffs, in response to defendant's motion for summary judgment, will present

specific evidence with specific individuals and companies identified to support each of the claims in their Complaint. Plaintiffs will request documents, propound interrogatories and take depositions in areas where they have specific evidence to support their claims.

These claims include (i) the "lock-in"; (ii) contract, combination or conspiracy with manufacturers of parts; (iii) contract, combination or conspiracy with parts customers; (iv) attempted monopolization of service; and (v) attempted monopolization of used equipment.

The following is an outline of the specific topics on which plaintiffs intend to take discovery. Following that is a description of each of the claims, the facts as to which discovery is required and the type of discovery needed, by topic.

Discovery Topics

1. Market definition (Kodak and Machine Owner documents, interrogatories and depositions)
   a. Numbers of machines
   b. Patterns of ownership of machines
   c. Sales of new machines
      i. Trade-ins
      ii. Financing
   d. Servicing of machines
      i. CEDS
      ii. EMA
      iii. Per call

e. Limitations on OEM parts

i. Patents

ii. Trade secrets

iii. Manufacturers' agreements or understandings

2. Parts, sales (Kodak, OEM customer documents, interrogatories and depositions)

a. Manufacture and inventory of parts

i. OEM/Kodak manufacture

ii. Inventories

iii. Demand for parts

b. Customers for parts

i. Kodak machine purchasers

ii. Service organizations

iii. Dealers

iv. ISO's

c. Parts policy and operation of policy

i. Basis of business justifications

d. Resale restrictions

3. Used machines (Kodak, OEM, customer documents, interrogatories and depositions)

a. Kodak purchase, resale

b. Third-party sales

c. Reconditioning

i. By Kodak

ii. By customer

d. Certification policy and practices

i. Basis of business justifications

i) Lock-in

The lock-in issue involves plaintiffs' allegations that because of business practicalities including: the high capital cost of photocopy machines and micrographic machines; the restrictive policies of Kodak on resale of used equipment; the restriction on servicing of used equipment; and the control of the sale of parts, machine owners are not free to "switch" their equipment to another brand if Kodak's parts or service are unsatisfactory, and thus no competition exists. Kodak disputes that these are the facts. Discovery with regard to the disputed facts which will be used to demonstrate that customers are "locked-in" includes the following topic areas: 1 a-c, 2 c and 3 a-d.

ii) OEM Contract, Combination or Conspiracy

The OEM issue involves plaintiffs' allegation that Kodak has prevented them from obtaining from manufacturers other than Kodak parts to service or recondition Kodak machines. Kodak denies there are facts to support this. Discovery with regard to disputed facts of the restrictions on OEM parts from third parties include the following topic areas: 1 e and 2 a-c.

iii) Contract, Combination or Conspiracy with Parts Customers

This issue involves plaintiffs' allegations that Kodak sells parts to service or recondition machines to parties

with the agreement that these parts will not be sold to ISO's or reconditioners competing with Kodak. These parties include ISO's in certain non-competing geographic regions, small non-competing ISO's and purchasers of Kodak machines who compete incidentally but who buy other Kodak parts. Kodak denies that this "knowingly" occurs. Discovery with regard to the disputed facts on this issue include the following topic areas: 1 d, 2 b-c.

iv) Attempted Monopolization of Service

This issue involves plaintiffs' allegations that Kodak has attempted to put ISO's, equipment reconditioners and brokers out of the business of servicing, reconditioning and selling used Kodak machines through a number of actions including those set forth in i, ii and iii and using its control over parts to require Kodak service. Kodak denies these allegations and the underlying facts. Discovery with regard to the disputed facts on this issue will include the following topic areas: 1 a-d; 2 a-d.

v) Attempted Monopolization of Used Equipment

This issue involves plaintiffs' allegations that Kodak has attempted to put equipment reconditioners and brokers out of the business of reconditioning and selling used Kodak machines through a number of policies, including those set forth in i-iv, and discriminatory and unreasonable certification fees. Kodak denies these facts. Discovery with regard to the disputed facts on this issue include the following topic areas: 3 a-d.

Defendant's Position: As noted earlier, the only genuinely controverted factual issues that are material to the case are the substance of Kodak's policies and the question of whether interbrand equipment competition prevents Kodak from charging monopolistic prices for service. If plaintiffs have any basis to request specific discovery on these issues, Kodak will not object and is willing to defer consideration of its motion for summary judgment so that plaintiffs have a reasonable opportunity to take that discovery. This would include plaintiffs "lock-in" theory, although specific parameters for this should be discussed at the status conference.

All of the other factual disputes identified by plaintiffs have been manufactured to avoid summary judgment. It is no surprise, for example, that plaintiffs' category "iii" alleges conspiracies identical to that considered by the Ninth Circuit in *Dimidowich*. They make those allegations even though (a) Kodak does not utilize independent service agents or engage in dual distribution, the *sine qua non* of the *Dimidowich* ruling on hybrid conspiracies, and (b) plaintiffs cannot allege specific conspirators even when challenged to do so. Plaintiffs should not be allowed to take discovery on this conspiracy claim unless it can make an offer of proof at the status conference naming particular conspirators and conspiracies. Discovery should then be limited to proving or disproving those specific allegations.

Plaintiffs also want discovery regarding their allegation that Kodak has conspired with certain unnamed original equipment manufactures to deny plaintiffs parts. Discovery on this theory should be denied even if plaintiffs can provide specifics and an offer of proof. Any such

conspiracy would be entirely vertical, and under *Dimidowich, Calculators Hawaii* and *Bushie*, Kodak would be entitled to summary judgment even if a conspiracy were presumed. *See* Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 35-36. There is, accordingly, nothing to be gained by taking discovery.

Finally, there is no basis for plaintiff taking discovery on its categories "iv" and "v," "attempted monopolization of service" and "attempted monopolization of used equipment." For the reasons stated in Kodak's summary judgment motion, the discovery contemplated by these catch-all categories is immaterial if Kodak is faced with interbrand equipment competition that limits its ability to exploit service or used equipment "markets." *See id.* at 27-28. Moreover, these categories are so broad and general that discovery pursuant to them would be without any meaningful limitations. There is no basis for general "fishing expedition" discovery given the pendency of Kodak's summary judgment motion.

As for Kodak's discovery plans, we have had document requests and interrogatories to plaintiffs outstanding since May. Plaintiffs have told us they intend to respond to them in late September. Kodak may or may not depose plaintiffs' affiants, depending on whether their testimony is truly material to our summary judgment motion. Kodak may also take some depositions based on plaintiffs' responses to the outstanding discovery, limited, of course, to the issues framed by the summary judgment motion.

7. Alternative Means of Disposition

The parties agree that this case is *not* suitable for reference to binding arbitration, to a master, or to a magistrate for trial.

8. Length of Trial

The parties agree that it is premature to estimate the length of trial, especially since the pending summary judgment motion may obviate the need for or limit the scope of trial.

9. Jury Trial

Plaintiff has demanded a jury trial.

10. Related Cases

There are no related cases.

11. Class Actions

Not Applicable.

12. Dates

Kodak submits that if discovery pertaining to the summary judgment motion is deemed proper, it should be limited to 90 days from the status conference (until December 10), and that all other discovery should be stayed pending the outcome of the motion. The parties agree that it is not advisable to set dates for discovery cutoff as to other issues, for the pretrial conference and

for trial until after the Court has ruled on Kodak's motion for summary judgment.

13. Settlement

There are no prospects for settlement, nor do the parties believe that settlement prospects would be enhanced at this time by a settlement conference.

14. Other Matters

None.

Dated: September 1, 1987.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., a California corporation; **J-E-S-P, COMPANY, INC.**, a New Jersey corporation; **SHIELDS BUSINESS MACHINES, INC.**, a Pennsylvania corporation; **MICROGRAPHIC SERVICES, INC.**, a Missouri corporation; **MICRO MAINTENANCE, INC.**, an Illinois corporation; **ATLANTA GENERAL MICROFILM CO., INC.**, a Georgia corporation; **ROGER KATONA d/b/a G.&S. ELECTRONICS**, a California partnership; **AMTECH EQUIPMENT MAINTENANCE, INC.**, a Minnesota Corporation; **ADVANCED SYSTEMS SERVICE, INC.**, a Colorado corporation; **B.C.S. TECHNICAL SERVICES, INC.**, a Colorado corporation; **BOB INGLE, INC.**, a Missouri corporation; **DATA PROX EQUIPMENT CO.**, a New Jersey corporation; **FISHER MICROGRAPHICS, INC.**, a Missouri corporation; **I.O.A.**	NO. C 87 1686 WWS ORDER

DATA CORP., a New York corporation; SEARLE ENTERPRISES, INC., d/b/a MICRO IMAGE, a Texas corporation; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC., a Minnesota corporation; OMNI MICROGRAPHIC SERVICES, INC., a California corporation; and CPO, LTD., a California corporation,

Plaintiffs,

vs.

EASTMAN KODAK COMPANY, a New Jersey corporation,

Defendant.

IT IS HEREBY ORDERED, that the briefing schedule and hearing for defendant's Motion for Summary Judgment in this action, originally scheduled for hearing by Order of the Court of August 18, 1987, for 11:00 a.m. September 11, 1987, is hereby set as follows:

a) September 18, 1987: Plaintiffs to file and serve opposition papers;

b) October 23, 1987: Defendant to file and serve reply papers; and

c) November 6, 1987: Hearing on Summary Judgment Motion, 11 A.m., Courtroom 9.

Said scheduling is conditioned upon counsel for plaintiffs and defendant meeting and conferring prior to the September 11, 1987 Status Conference to establish a specific discovery program with particular reference to issues defined by the defendant's summary judgment

motion, and on the submitting of said program in their status conference statement(s).

The Status Conference set for September 11, 1987 at 9:00 a.m. will take place as scheduled.

9/5/87

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States
District Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, v. EASTMAN KODAK COMPANY, Defendant.	No. C 87 1686 WWS KODAK'S ANSWERS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Defendant Eastman Kodak Company responds and answers to Plaintiffs' First Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Kodak objects to each interrogatory to the extent that it seeks information which is not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987.

2. Kodak objects to each interrogatory to the extent it seeks information protected by the attorney-client privilege or the work product doctrine.

3. Kodak objects to the definition of "Kodak" and "Defendant" on the ground that it is overbroad and unduly burdensome. In answering these interrogatories, Kodak has sought information from those of its employees reasonably likely to have responsive information and has reviewed documents and records reasonably likely to contain responsive information.

4. Kodak objects to the definitions of "identify" and "identity" with respect to both documents and persons on the ground that it is overbroad and unduly burdensome. Kodak will identify documents by providing a description of the document sufficient to seek it through appropriate discovery methods, and will identify persons by name. Unless otherwise indicated, all persons named in these answers are present or former employees of Kodak.

5. Kodak objects to the first paragraph of the "Instructions" on the ground that it is unduly burdensome. Kodak will furnish such information as is responsive to the interrogatories and which it has been able to obtain through the exercise of reasonable diligence.

6. Each General Objection is incorporated into each of the Specific Responses stated below.

SPECIFIC RESPONSES

INTERROGATORY NO. 1:

What were all of the factors causing defendant's change in the micrographics equipment replacement parts policy with respect to "new products" set out in the

April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1?

(a) Identify the persons involved in approving the policy change.

(b) Identify the documents on which these persons relied in approving the change.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the change relied.

(d) When did the process for the policy change begin?

(e) When was the decision made to change the policy?

(f) Has the policy been altered since the change?

(g) Does the practice ever vary in any way from the policy? If so, how and why?

RESPONSE TO INTERROGATORY NO. 1:

The business reasons for the referenced "new products" practice are set forth in the Declarations of Emmett A. Gross (¶¶6-10) and John A. Lacy (¶¶22-30), which are incorporated herein. Some are also stated in the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1.

a. John A. Lacy and Emmett A. Gross approved the referenced policy.

b. Other than the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1, Kodak is unaware of any documents relied on in approving the referenced policy.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that Donald B. Sanders, Robert J. Stankard, and Joseph M. O'Brien provided information to and advised Messrs. Lacy and Gross. Others may have been tangentially involved.

d. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous as to the meaning of the phrase "process for the policy change." Without waiving this objection, Kodak responds as follows: Kodak first began considering whether it should change its practices with respect to selling micrographics parts in the latter half of 1984 or early 1985. Kodak actively began to consider a new policy two to three months prior to the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1.

e. On or about April 12, 1985.

f. No.

g. Not to Kodak's knowledge, and not intentionally.

INTERROGATORY NO. 2:

What were all of the factors causing the defendant's change in the micrographics equipment replacement parts policy with respect to "older products" as set out in

the July 15, 1986 letter attached to the Lorenson Declaration as Exhibit 1?

(a) Identify the persons involved in approving the policy change.

(b) Identify the documents on which these persons relied in approving the change.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the change relied.

(d) When did the process for the policy change begin?

(e) When was the decision made to change the policy?

(f) Has the policy been altered since the change?

(g) Does the practice ever vary in any way from the policy? If so, how and why?

RESPONSE TO INTERROGATORY NO. 2:

Kodak objects to this interrogatory on the grounds that it is vague, ambiguous, and misstates the facts. The July 15, 1986 letter attached to the Lorenson Declaration as Exhibit 1 does not reflect a change in the then-existing policy with respect to parts for "older products." Rather, it implements the policy adopted on or about April 12, 1985 and reflected in the memorandum of that date attached to the Gross Declaration as Exhibit 1. Assuming that plaintiffs seek information about the April 12, 1985

policy change, Kodak refers to its response to Interrogatory No. 1. Assuming plaintiffs seek information about the July 15, 1986 letter, Kodak refers plaintiffs to the Declaration of Robert A. Lorenson (¶¶3-12).

a. John A. Lacy and Emmett A. Gross approved the referenced policy in April 1985. Robert A. Lorenson approved the text of the July 15, 1986 letter.

b. The April 12, 1985 memorandum was relied on in preparing the July 15, 1986 letter. Kodak is unaware of any additional documents responsive to this interrogatory.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that Donald B. Sanders, Robert J. Stankard, and Joseph M. O'Brien provided information to and advised Messrs. Lacy and Gross with respect to the April 1985 policy decision. Joseph M. O'Brien provided information and advised Mr. Lorenson with respect to the July 15, 1986 letter.

d. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous as to the meaning of the phrase "process for the policy change." Without waiving this objection, Kodak responds as follows: Kodak first began considering whether it should change its practices with respect to selling micrographics parts in the latter half of 1984 or early 1985. Kodak actively began to consider a new policy two to three months prior to the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1. Kodak began considering whether to

send a letter like the July 15, 1986 letter in approximately March 1986.

e. The policy was adopted on or about April 12, 1985.

f. No. *See*, however, the Declaration of Robert A. Lorenson (¶¶4-10, 17).

g. Kodak has not knowingly deviated from the referenced policy and makes every effort to enforce it consistently. As explained in the Declaration of Robert A. Lorenson, however, there have been instances when independent service organizations have been able to breach Kodak's enforcement procedures and obtain parts. Kodak does not know how this occurs.

INTERROGATORY NO. 3:

What were all of the factors causing defendant's change in the "CESD Replacement Parts Principles" on or about December 2, 1985, including but not limited to the language which stated:

> KODAK DISTRIBUTES PARTS THROUGHOUT THE WORLD AND DOES NOT RELY UPON DEALERS, AGENTS OR DISTRIBUTORS IN THE U.S. TO PERFORM THIS DISTRIBUTION FUNCTION. THEREFORE, KODAK WILL SELL REPLACEMENT PARTS TO ANY PARTY WHO INTENDS TO USE THEM TO REPAIR KODAK EQUIPMENT.

(a) Identify the persons involved in approving the change.

(b) Identify the documents on which these persons relied in approving the change.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the change relied.

(d) When did the process for the change begin?

(e) When was the decision made to make the change?

(f) Why was the change made?

RESPONSE TO INTERROGATORY NO. 3:

The quoted language appeared on microfiche containing the complete CESD parts list. This list comprised thousands of parts for products marketed by numerous Kodak Business Units, not just micrographics and copier parts. Some of these Business Units allow CESD to sell replacement parts for their products to any party intending to repair Kodak equipment. In May of 1985, during a routine review of the so-called "CESD Replacement Parts Principles," Kodak personnel determined that the quoted language was inaccurate as applied to BISD and Copy Products parts. It was therefore deleted.

a. John C. Englert, Neil W. Farrar, Gordon A. Greenfield, Anthony E. Pellicia, Donald B. Sanders.

b. No currently identifiable documents were relied upon in approving the deletion of the quoted language.

c. Not applicable, since Kodak is unaware that any such analyses were undertaken.

d. May 1985.

e. The decision to make the change was made on or about June 10, 1985. The change was fully implemented when the parts list was revised and issued in December 1985.

f. See above.

INTERROGATORY NO. 4:

What were all of the factors causing defendant's change in the "Terms of Sale" for CESD replacement parts sales on or about December 1, 1986, including but not limited to adding the language which stated:

> PARTS ARE STOCKED TO MEET THE REPAIR NEEDS OF KODAK'S AUTHORIZED DEALERS, DISTRIBUTORS, SERVICE OUTLETS, KODAK CUSTOMER EQUIPMENT SERVICES FIELD ENGINEERS AND EQUIPMENT SERVICE CENTERS, GOVERNMENT USERS, AND OTHER USERS WHO PURCHASED EQUIPMENT DIRECTLY FROM KODAK AND WHO SERVICE ONLY THEIR OWN KODAK EQUIPMENT.

(a) Identify the persons involved in approving the change.

(b) Identify the documents on which these persons relied in approving the change.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the change relied.

(d) When did the process for the change begin?

(e) When was the decision made to make the change?

(f) Why was the change made?

RESPONSE TO INTERROGATORY NO. 4:

The quoted language was added as a result of a routine review of the Terms of Sale which commenced in August of 1986. It was added to provide information regarding Kodak's business practices.

a. Neil W. Farrar, Robert A. Lorenson, Emmett A. Gross, Ronald A. Bern.

b. Other than the draft of the revised Terms of Sale, Kodak is unaware of any such documents.

c. Not applicable, since Kodak is unaware that any such analyses were undertaken.

d. August 1986.

e. September 11, 1986.

f. The quoted language was added simply to inform Kodak's customers of the facts stated. Certain customers not falling within the groups identified in the quoted language were previously informed that there might be delays in filling their orders for older micrographic equipment parts because such parts were not stocked for their benefit. The quoted language reiterated this message.

INTERROGATORY NO. 5:

What were all of the factors for defendant's policy not to sell photocopy replacement parts to persons for

use in the service or repair of other parties' photocopy equipment?

(a) Identify the persons involved in adopting the policy.

(b) Identify the documents on which these persons relied in adopting the policy.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons adopting the policy relied.

(d) Has the policy been altered since its adoption?

(e) Does the practice ever vary in any way from the policy? If so, how and why?

RESPONSE TO INTERROGATORY NO. 5:

The business reasons for the referenced policy are set forth in the Declarations of Michael J. Murray (¶¶23-32) and Emmett A. Gross (¶12), which are incorporated herein.

a. Michael J. Murray approved the referenced policy.

b. No currently identifiable documents were relied upon in approving the referenced policy.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this

objection, Kodak answers that the following persons participated in the decisionmaking process: Michael J. Murray, Edward V. Ince, Joseph F. Iadorola, Joseph A. McGrain, Donald B. Sanders, Lynn Brockman Gleason, and John K. Secker.

d. No.

e. Not to Kodak's knowledge, and not intentionally.

INTERROGATORY NO. 6:

On what basis did defendant sell photocopy equipment replacement parts to each of the plaintiffs who purchased such parts from defendant?

(a) Identify the persons approving and making the sales.

(b) Identify the documents concerning the sales and on which these persons relied in approving the sales.

RESPONSE TO INTERROGATORY NO. 6:

Kodak objects to this interrogatory on the ground that it is unintelligible because it fails to identify the individual plaintiffs which have purchased copy parts from Kodak, and unduly burdensome to the extent that plaintiffs ask Kodak to determine whether it has ever sold copy parts to each plaintiff. Kodak is unable to answer this interrogatory fully until such time as plaintiffs provide this information and respond to the discovery requests that Kodak previously served on them. Without waiving this objection, Kodak responds as follows:

Kodak has never intentionally deviated from its policy not to sell unique copier parts to independent service organizations. To the extent that any of the plaintiffs have been able to purchase copier parts from Kodak, that is either the result of Kodak's inability to police its policy with 100% effectiveness, because certain parts are also used in other Kodak equipment for which plaintiffs may purchase parts, or for reasons unknown to Kodak.

a. Kodak has never knowingly approved such a sale since adopting and implementing the referenced policy. Without being provided with the details of a particular sale, Kodak is unable to identify the person or persons making any such sale.

b. Without being provided with the details of such sales, Kodak is unable to identify relevant documents.

INTERROGATORY NO. 7:

What were all of the factors causing defendant's subsequent refusal to sell photocopy equipment replacement parts to the plaintiffs who purchased such parts from defendant in the past.

(a) Identify the persons involved in the refusal.

(b) Identify the documents on which these persons relied in the refusal.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the refusal relied.

(d) When did the process for the change begin?

(e) When was the decision made to make the change?

(f) Has the policy been altered since the change?

RESPONSE TO INTERROGATORY NO. 7:

Kodak objects to this interrogatory on the ground that it is unintelligible because it fails to identify instances in which Kodak first sold copier parts to a plaintiff and later refused to do so. Without this information, Kodak cannot respond to the interrogatory. Kodak also objects to the interrogatory in the ground that it is vague and ambiguous, particularly sub-paragraphs (d), (e) and (f) (re "the change"). Without waiving this objection, Kodak refers plaintiffs to its Response to Interrogatory No. 5 regarding Kodak's business reasons for not selling copier parts to independent service organizations.

a. Not applicable.

b. Not applicable.

c. Not applicable.

d. Not applicable.

e. Not applicable.

f. Not applicable.

INTERROGATORY NO. 8:

Identify all persons other than plaintiffs who received the letter of July 15, 1986, attached to the Lorenson Declaration as Exhibit 1, and identify each letter.

RESPONSE TO INTERROGATORY NO. 8:

Kodak objects to this interrogatory on the ground that the identities of persons other than plaintiffs who were sent the July 15, 1986 letter is not relevant and is not likely to lead to the discovery of evidence relevant to this action. Without waiving this objection, a list of persons who were sent the letter or a later version of the letter is attached as Exhibit A hereto. Each listed person was sent the letter in a form substantially similar to Exhibit 1 to the Lorenson Declaration. The letter was also sent to BISD and CESD field and headquarters management.

INTERROGATORY NO. 9:

What were all of the factors which determined the content of the letters of July 15, 1986 and who received the letter of July 15, 1986 attached to the Lorenson Declaration as Exhibit 1?

(a) Identify the persons involved in approving the letter and identifying the persons to whom it was sent.

(b) Identify the documents on which these persons relied in approving the letter and identifying to whom it was sent.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the letter and identifying to whom it was sent relied.

(d) When did the process identifying the recipients of the letter begin?

(e) When was the decision made as to whom the letter was sent?

RESPONSE TO INTERROGATORY NO. 9:

Kodak objects to this interrogatory on the ground that it is vague and ambiguous as to the phrase "factors which determined the content of the letters." Without waiving these objections, Kodak responds as follows:

The Declaration of Robert A. Lorenson (¶¶ 2-4) states why Kodak sent out the letters. The purposes described by Mr. Lorenson determined the contents of the letters. Letters were sent to all persons known by Kodak to be in the business of providing third party service on Kodak micrographics equipment. The list of addressees was compiled from input received from Kodak field sales and service personnel. They were asked to identify persons and entities in their regions which were known to provide third party service. The collective input was assembled at Kodak's headquarters in Rochester, and the letters were sent from there.

a. Robert A. Lorenson approved the letter. The persons to whom it was sent are listed in response to Interrogatory No. 8.

b. Other than the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1, Kodak is unaware of any documents relied on in preparing the letter that are currently in its possession. In response to requests from Kodak personnel in Rochester, Kodak field

sales and service personnel sent lists of names to Rochester, but the original lists were discarded when the cumulative list was prepared.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that Robert A. Lorenson and Joseph M. O'Brien were responsible for preparing and disseminating the letter.

d. Approximately March 1986.

e. May 1986.

INTERROGATORY NO. 10

What were all of the factors causing adoption of defendant's policy and practices concerning service of used micrograpics equipment as set out in the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1?

(a) Identify the persons involved in adopting the policy/practices.

(b) Identify the documents on which these persons relied in adopting the policy/practices.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons adopting the policy/practices relied.

(d) When did the process for the adoption of the policy/practices begin?

(e) When was the decision made to adopt the policy/practices?

(f) Have the policy/practices been altered since their adoption?

RESPONSE TO INTERROGATORY NO. 10:

The business reasons for the referenced policy are set forth in the Declarations of Emmett A. Gross (¶¶ 2-5) and John A. Lacy (¶¶ 31), which are incorporated herein. Some are also stated in the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1.

a. John A. Lacy and Emmett A. Gross approved the referenced policy.

b. Other than the April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1, Kodak is unaware of any documents relied on in approving the referenced policy.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that Donald B. Sanders, Robert J. Stankard, and Joseph M. O'Brien participated in the decisionmaking process and advised Messrs. Lacy and Gross. Others may have been tangentially involved.

d. Kodak objects to this sub-paragraph on the ground that the phrase "process for the adoption of the policy/practices" is vague. Without waiving this objection, Kodak answers that its headquarters personnel first began receiving reports that CESD was being asked to

service resold but improperly maintained Kodak equipment in late 1984 or early 1985. These reports caused Kodak to review it policies with respect to servicing used equipment.

e. On or about April 12, 1985.

f. There have been some modifications to the details of the policy with respect to "per call" service, but the basic policy of not placing resold equipment under an EMA without first inspecting it and bringing it up to current performance expectations has not changed.

INTERROGATORY NO. 11

What were all of the factors causing adoption of defendant's policy or practices concerning service of used photocopy equipment as set out in the August 5, 1985 memorandum which is attached to the Murray Declaration as Exhibit 7?

(a) Identify the persons involved in adopting the policy/practices.

(b) Identify the documents on which these persons relied in adopting the policy/practices.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons adopting the policy/practices relied.

(d) When did the process for the adoption of the policy/practices begin?

(e) When was the decision made to adopt the policy/practices?

RESPONSE TO INTERROGATORY NO. 11:

The business reasons for the referenced policy are set forth in the Declarations of Michael J. Murray (¶¶ 33-34) and Emmett A. Gross (¶ 12), which are incorporated herein.

a. Michael J. Murray and Edward V. Ince approved the referenced policy.

b. No currently identifiable documents were relied upon in approving the referenced policy.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that the following persons participated in the decisionmaking process: Michael J. Murray, Edward V. Ince, Donald B. Sanders, Lynn Brockman Gleason, and John K. Secker.

d. Kodak objects to this sub-paragraph on the ground that the phrase "process for the adoption of the policy/practices" is vague. Without waiving this objection, Kodak answers as follows: during the second quarter of 1985.

e. Shortly before August 5, 1985.

INTERROGATORY NO. 12:

What were all of the factors causing defendant's change in the policy or practices concerning service of used photocopy equipment as set out in the October 18,

1985 memorandum which is attached to the Murray Declaration as Exhibit 8?

(a) Identify the persons involved in approving the policy/practices change.

(b) Identify the documents on which these persons relied in approving the change.

(c) Identify the persons who analyzed the factors, markets, products, supply, demand, inventories, profits or other things on which the persons approving the change relied.

(d) When did the process for the policy/practices change begin?

(e) When was the decision made to change the policy/practices?

(f) Have the policy/practices been altered since the change?

RESPONSE TO INTERROGATORY NO. 12:

The change in the policy reflected in the October 18, 1985 memorandum corrected an oversight in the original policy stated in the August 5, 1985 memorandum. Subsequent to August 5, Kodak learned that some resold copiers had been serviced by Kodak under an EMA continuously, that they had been stored and shipped properly, and thus met current performance expectations. Kodak was willing to service such copiers under an EMA, and did not want to charge customers for unnecessary inspection fees. Kodak therefore modified the policy so

that machines which had been under an EMA continuously could be placed under an EMA again, subject only to a pre-installation inspection for transportation or storage damage. Specific guidelines for implementing this policy were also established and are found in the October 18 memorandum, which is incorporated by reference.

a. Michael J. Murray and Edward V. Ince approved the referenced policy.

b. No currently identifiable documents were relied upon in approving the referenced policy.

c. Kodak objects to this sub-paragraph on the ground that it is vague and ambiguous and incorrectly implies that analyses of all or some of the listed factors were prepared and relied upon. Without waiving this objection, Kodak answers that the following persons participated in the decisionmaking process: Michael J. Murray, Edward V. Ince, Lynn Brockman Gleason, John Secker.

d. Kodak objects to this sub-paragraph on the ground that the phrase "process for the policy/practices change" is vague. Without waiving this objection, Kodak answers as follows: approximately September 1985.

e. Shortly before October 18, 1985.

f. No.

INTERROGATORY NO. 13:

With respect to defendant's allegation in its Answer to the Complaint on file herein, that damages to plaintiffs "were not caused by Kodak but are the result of the

conduct of . . . plaintiff(s) including, without limitation, said plaintiff(s') undertaking contractual obligations to provide to customers Kodak supplies and parts that said plaintiffs at all times knew it (they) would be unable to purchase from Kodak," please state:

(a) Each fact on which you base this allegation;

(b) The identity of each document that concerns each fact which supports this allegation;

(c) The identity of each person who has or claims to have any knowledge or information regarding any fact which supports this allegation.

RESPONSE TO INTERROGATORY NO. 13:

Kodak objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987. Kodak also objects to this interrogatory at this time because plaintiffs have not, even though they were required to do so five months ago, produced to Kodak interrogatory answers and documents relevant to this subject. Kodak will defer answering this interrogatory until after the summary judgment motion is decided, by which time it will have had an opportunity to review plaintiffs' discovery responses.

INTERROGATORY NO. 14:

With respect to defendant's allegation in its Answer to the Complaint on file herein, that "plaintiffs have . . . deliberately, fraudulently, and in bad faith concealed

from Kodak the material fact that they intended to resell the supplies and replacement parts purchased from Kodak, knowing that if that fact had been revealed, Kodak would not have sold them the supplies and parts requested," please state:

(a) Each fact on which you base this allegation;

(b) The identity of each document that concerns each fact which supports this allegation;

(c) The identity of each person who has or claims to have any knowledge or information regarding any fact which supports this allegation.

RESPONSE TO INTERROGATORY NO. 14:

Kodak objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987. Kodak also objects to this interrogatory at this time because plaintiffs have not, even though they were required to do so five months ago, produced to Kodak interrogatory answers and documents relevant to this subject. Kodak will defer answering this interrogatory until after the summary judgment motion is decided, by which time it will have had an opportunity to review plaintiffs' discovery responses.

INTERROGATORY NO. 15:

With respect to defendant's allegation in its Answer to the Complaint on file herein, that "plaintiff(s) have- . . . fraudulently, falsely, and in bad faith represented and

held themselves out to the public as able and entitled to purchase Kodak supplies and replacement parts from Kodak for resale to plaintiffs' customers, at all times knowing that said representations were false," please state:

(a) Each fact on which you base this allegation;

(b) The identity of each document that concerns each fact which supports this allegation;

(c) The identity of each person who has or claims to have any knowledge or information regarding any fact which supports this allegation.

RESPONSE TO INTERROGATORY NO. 15:

Kodak objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of Septen.ber 18, 1987. Kodak also objects to this interrogatory at this time because plaintiffs have not, even though they were required to do so five months ago, produced to Kodak interrogatory answers and documents relevant to this subject. Kodak will defer answering this interrogatory until after the summary judgment motion is decided, by which time it will have had an opportunity to review plaintiffs' discovery responses.

INTERROGATORY NO. 16:

Identify all persons to whom Kodak sells micrographic or photocopy equipment replacement parts, other than pursuant to an EMA or on a "per call" basis, who do

not now own micrographic or photocopy equipment purchased directly from Kodak for which such parts could be used.

(a) Identify each person who has knowledge or information of such sales;

(b) Identify each document concerning all such sales.

RESPONSE TO INTERROGATORY NO. 16:

Kodak objects to this interrogatory on the ground that it is unduly burdensome and calls for information not in Kodak's possession and which Kodak cannot through the exercise of reasonable diligence obtain. The only persons whose identities are called for by this interrogatory whom Kodak can name are those to whom it sells older micrographic parts; they are listed in Exhibit A hereto. Kodak does not knowingly sell newer micrographic parts or copier parts, other than pursuant to an EMA or on a per call basis, to persons who do not own micrographic or photocopy equipment which they purchased directly from Kodak. However, Kodak cannot be sure that it is not inadvertantly making such sales.

INTERROGATORY NO. 17:

Does defendant contend that the plaintiffs, or any of them, provide, or have provided, service for micrographics or photocopy equipment that is inferior to that provided by Kodak? Whether defendant's answer is in the affirmative or negative, please state the following:

(a) Each fact on which you base this answer;

(b) The identity of each document concerning each fact that supports your answer;

(c) The identity of each person who has knowledge of such facts.

RESPONSE TO INTERROGATORY NO. 17:

Yes.

a. Kodak's service has long been recognized by independent surveys as the very best in both the copier and micrographics industries. In addition, there have been numerous instances when equipment owners have contacted Kodak for service because they were dissatisfied with the quality of ISO service. These include customers, such as agencies of the State of California, which were or are serviced by one of the plaintiffs. There are no ISOs which, to Kodak's knowledge, have invested in training nearly as heavily (even on a proportional basis) as Kodak, and by virtue of its superior knowledge of copier and micrographic technology, Kodak has proprietary diagnostic and service techniques which are unavailable to ISOs. Kodak also manufactures or procures all the parts it needs to service its customers.

b. Kodak objects to this sub-paragraph on the ground that it is overbroad and unduly burdensome. Kodak is unaware of any documents which specifically compare Kodak service versus that provided by one of the plaintiffs.

c. Kodak objects to this sub-paragraph on the ground that it is overbroad and unduly burdensome, particularly since many persons share the view that

Kodak service is the best in both the copier and micrographics industries. Michael J. Murray, John A. Lacy, Emmett A. Gross, Robert A. Lorenson and Edward V. Ince have knowledge of such facts.

INTERROGATORY NO. 18:

Does defendant contend that owners of micrographics or photocopy equipment have or would sell or would trade-in their equipment for other brands in any appreciable numbers in response to a rise in the price of service? Whether defendant's answer is in the affirmative or negative, please state the following:

(a) Each fact on which you base this answer;

(b) The identity of each document concerning each fact that supports your answer;

(c) The identity of each person who has knowledge of such facts.

RESPONSE TO INTERROGATORY NO. 18:

Yes.

a. Buyers of micrographics and copy equipment choose among competing vendors by, among other things, comparing relative costs over the lifetime of the equipment. In addition, buyers of micrographics equipment compare the relative costs of managing images through micrographics versus hard copy paper files. The "Selecting A Copier" publication by Datapro attached as Exhibit 6 to the Murray Declaration is an example of this; it recommends a method of comparing copier costs that

accounts for service costs over the lifetime of the copier. A significant increase in the total costs of utilizing Kodak products to perform their intended tasks, even if accomplished through a service price increase only, would result over time in a substantial decrease in Kodak's equipment sales and market share. This is basic economics, and it is Kodak's experience that economic principles apply in full force to the copier and micrographics industries. See the Declarations of Michael J. Murray (¶¶ 15-16) and John A. Lacy (¶¶ 14-18), incorporated herein, for additional responsive information.

b. Kodak will produce documents which set forth its service pricing for micrographics and copy products.

c. Michael J. Murray and John A. Lacy have knowledge of these facts, as do hundreds of micrographic and copy equipment salespeople and marketing and pricing specialists at Kodak and other companies. Kodak is unable to list all persons with knowledge of such basic facts.

INTERROGATORY NO. 19:

With respect to defendant's statement in its Memorandum that plaintiffs "refuse to make their own parts or obtain them from other sources" and "do not invest in high quality service, for example by investing in training," please state:

(a) Each fact on which you base this allegation;

(b) The identity of each document that concerns each fact which supports this allegation;

(c) The identity of each person who has or claims to have any knowledge or information which supports this allegation.

RESPONSE TO INTERROGATORY NO. 19:

Plaintiff objects to answering this interrogatory at this time because the information requested is primarily in the hands of the plaintiffs, who have not yet responded to Kodak's discovery requests on this subject. Kodak reserves the right to supplement its answer once discovery on this issue has been completed. Without waiving this objection, Kodak responds as follows:

a. The fact that plaintiffs refuse to make their own parts is obvious from their repeated attempts to obtain them from Kodak and from the filing of this lawsuit. It may be plaintiffs make some parts (Kodak is unaware of this), but as to each part that plaintiffs attempt to obtain from Kodak — which must logically be all the Parts at issue in this case — it must be that plaintiffs do not make that part. Otherwise there is no point to either plaintiffs' request to Kodak or to this case. Moreover, plaintiffs' counsel argued at the Status Conference in this case that plaintiffs cannot make their own parts because micrographics and copy equipment has a short useful life.

Kodak's belief that plaintiffs do not invest in training nearly to the extent that Kodak does (even on a proportional basis) is derived from observations about the poor quality of ISO service and the absence of any evidence to the contrary. Kodak does not deny that plaintiffs train their employees to some minimal extent, but the quality

of ISO technicians is, at best, uneven, which Kodak attributes in part to poor training.

b. The document establishing that plaintiffs do not make their own parts is the Complaint in this action, which alleges that plaintiffs are unable to obtain the parts at issue in this case from sources other than Kodak (P 22). Kodak must defer identifying documents relating to training by plaintiffs until discovery on this issue is completed.

c. Michael J. Murray, John A. Lacy, Emmett A. Gross, Robert A. Lorenson and Edward V. Ince have knowledge of such facts, but they will be developed primarily from plaintiffs' principals and employees.

INTERROGATORY NO. 20:

Does defendant sell micrographics and photocopy equipment replacement parts to owners who have purchased their equipment directly from Kodak where such parts are for use in servicing that equipment through independently contracted labor. Whether defendant's answer is in the affirmative or negative, please state the following:

(a) Each fact on which you base this answer;

(b) The basis for this policy/practice;

(c) The identity of each document concerning each fact that supports the basis for this policy/practice;

(d) The identity of each person who has information or knowledge of such facts.

RESPONSE TO INTERROGATORY NO. 20:

Kodak objects to this interrogatory on the ground that it is vague and ambiguous as to the meaning of the phrase "independently contracted labor." Without waiving this objection, Kodak responds as follows, assuming that "independently contracted labor" refers to ISOs:

Kodak prefers not to sell newer micrographic equipment parts or copier parts under these conditions. However, Kodak has no effective means to prevent direct equipment customers from purchasing parts, ostensibly to perform their own service, when in fact they have an ISO service their equipment. Kodak suspects that it has sold parts to its customers under these conditions.

a. Kodak's replacement parts policies and the business reasons therefor are stated in response to Interrogatory Nos. 1, 2, and 5.

b. Kodak's replacement parts policies and the business reasons therefor are stated in response to Interrogatory Nos. 1, 2, and 5.

c. April 12, 1985 memorandum attached to the Gross Declaration as Exhibit 1; July 15, 1986 letter attached to the Lorenson Declaration as Exhibit 1; August 5, 1985 memorandum attached to the Murray Declaration as Exhibit 7.

d. Michael J. Murray, John A. Lacy, Emmett A. Gross, Robert A. Lorenson, Joseph M. O'Brien, Lynn Brockman Gleason and Edward V. Ince have knowledge of such facts, as do many other Kodak employees charged

with implementing the policies (for example, most Customer Service Assistants). It is impracticable to identify all such persons.

INTERROGATORY NO. 21:

Identify all geographic areas or locations in the United States where defendant does not offer service on micrographic and/or photocopy equipment.

RESPONSE TO INTERROGATORY NO. 21:

Kodak objects to this interrogatory on the ground that it is unduly burdensome to list each geographic area in which it does not offer service on Kodak Ektaprint copiers. Without waiving this objection, Kodak responds as follows:

In general, Kodak sells and services its Ektaprint copiers only in populous areas. There are, consequently, hundreds or thousands (depending on how one wishes to count them) of rural and lightly populated areas in which Kodak does not offer copier service. In response to this Interrogatory, Kodak will produce a list of those cities in which copier service is available from Kodak.

Kodak services micrographic equipment throughout the United States, except for some parts of Alaska.

INTERROGATORY NO. 22:

Identify all persons who offer service on micrographic and/or photocopy equipment in each area or location identified in response to Interrogatory No. 21.

RESPONSE TO INTERROGATORY NO. 22:

Kodak objects to this interrogatory on the ground that is vague and ambiguous. It does not specify whether information is requested with respect to service on all micrographic and copy equipment, or just Kodak equipment. It also fails to specify whether it is seeking information regarding service offered by ISOs or by independent firms on behalf of Kodak (there are no such firms). Kodak also objects to this interrogatory on the ground that it seeks information which is neither relevant, nor likely to lead to the discovery of information relevant, to the issues in this case, and is unduly burdensome. Lastly, Kodak objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987.

INTERROGATORY NO. 23:

Does defendant supply any of the persons identified in the response to Interrogatory No. 22 with micrographics and/or photocopy replacement parts?

(a) If so, what are the terms and conditions of sale?

(b) Are there any restrictions on the use or resale of those parts?

(c) Identify all documents concerning such sales.

(d) Identify each person who has knowledge or information of such sales.

RESPONSE TO INTERROGATORY NO. 23:

Not applicable. Kodak does not have any relations with independent firms by which such firms provide copier or micrographic service on Kodak's behalf in any region of the United States, and thus does not sell parts to any such firms.

INTERROGATORY NO. 24:

Has defendant made any studies of the micrographics or photocopy equipment replacement parts or service markets? If so, please state the following:

(a) The identity of all documents concerning said studies.

(b) The identity of all persons having knowledge or information of said studies.

(c) The name of the custodian of records for any such studies and the documents supporting them.

RESPONSE TO INTERROGATORY NO. 24:

Kodak objects to this interrogatory on the ground that it is vague, ambiguous and overbroad. Kodak specifically objects to the phrase "studies of the micrographics or photocopy equipment replacement parts or service markets." First, Kodak does not recognize that there are any such markets, so it has no studies of them. Second, the word "studies" without modification, limitation or definition is vague and overbroad. Without waiving this objection, Kodak responds as follows:

Kodak has no studies of any assumed "replacement parts market." Kodak has performed studies relating to service issues, in particular customer satisfaction surveys. We do not interpret this interrogatory to call for the identification of such surveys, but we will produce them if requested to do so. Kodak has also prepared studies of service competition between copier manufacturers, and those will be produced.

a. Kodak's studies of service competition between copier manufacturers will be produced.

b. Michael J. Murray, Jeffrey L. Bradley, Peter J. Landers, Amy D. McHale

c. Jeffrey L. Bradley

INTERROGATORY NO. 25:

Does defendant contend that owners of Kodak micrographics or photocopy equipment do not constitute a "relevant market" for replacement parts and for service of such equipment? If defendant's answer is in the negative, please state in detail:

(a) Each fact on which you base your answer;

(b) The identity of each document concerning each fact supporting your contention;

(c) The identity of each person who has or claims to have any knowledge or information concerning any fact supporting your contention.

RESPONSE TO INTERROGATORY NO. 25:

Kodak objects to this interrogatory on the ground that it is unintelligible because plaintiffs fail to state the purpose for which owners of Kodak micrographics or photocopy equipment might constitute a "relevant market." Kodak also objects to this interrogatory because the question of whether a particular market, assuming it exists in fact, is relevant to the antitrust analysis of a particular allegation is one of law. Without waiving these objections, Kodak responds as follows:

As stated in Kodak's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment (pp. 27-28 & n.4), it is unnecessary to determine whether, as a matter of fact, there are distinct markets for parts or service in which the only consumers are owners of Kodak equipment. That is because, as a matter of law, the undisputed fact that Kodak is not a monopolist in the relevant interbrand equipment markets disposes of this case. Therefore, without waiving its right to make such a contention in the future, at this time Kodak neither contends that there are, nor that there are not, distinct markets for parts or service in which the only consumers are owners of Kodak equipment.

a. Not applicable.

b. Not applicable.

c. Not applicable.

INTERROGATORY NO. 26:

What does defendant contend the relevant market for the purpose of this litigation should be defined as?

(a) State each fact on which you base this definition;

(b) Identify each document which supports this definition;

(c) Identify each person who has or claims to have knowledge concerning this definition.

RESPONSE TO INTERROGATORY NO. 26:

Given the theory of plaintiffs' Complaint, *i.e.*, that Kodak has anticompetitively leveraged its control over replacement parts to monopolize service markets, it would be necessary at trial for the plaintiffs to define two types of relevant markets and prove Kodak's market power in both types: first, the markets from which Kodak's control over parts derives; and second, the service markets which Kodak is trying to monopolize by using its alleged control of parts. Because Kodak's supplies of replacement parts are an incident of its status as an equipment manufacturer and vendor, Kodak contends that plaintiffs must first prove that Kodak has monopoly power in the interbrand micrographics and copy equipment markets. It is undisputed that Kodak lacks market power in those markets. Consequently, it is unnecessary to determine whether Kodak has market power in any service markets, however defined, and so without waiving its right to do so in the future, Kodak does not at this time make a contention with respect to the contours of the relevant service markets.

INTERROGATORY NO. 27:

Identify, by parts number, each replacement part for micrographics or photocopy equipment which Kodak claims is protected by patents or trade secrets.

RESPONSE TO INTERROGATORY NO. 27:

Kodak objects to this interrogatory on the ground that it seeks information which is not relevant, and which is not likely to lead to the discovery of information relevant, to this action. Kodak also objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987. Lastly, Kodak objects to this interrogatory because it is unduly burdensome. Kodak's Ektaprint copiers have over 10,000 parts, its micrographics and other business imaging equipment have approximately 20,000 parts, and it has nearly 900 patents in the fields of electrophotography, copying and microimaging. Kodak has never attempted to correlate, item by item, its patents to particular equipment parts, and it would be extremely time-consuming and expensive to do so.

INTERROGATORY NO. 28:

With respect to defendant's statement in its Memorandum that owners of Kodak micrographics and photocopy equipment would (or do) readily switch to some other manufacturer's equipment in response to monopoly prices in service or parts, please state the following in detail:

(a) Each fact on which you base your contention;

(b) The identity of each document concerning each fact that supports your contention;

(c) The identity of each person who has or claims to have knowledge or information concerning any fact supporting your contention.

RESPONSE TO INTERROGATORY NO. 28:

Kodak objects to this interrogatory on the grounds that it is duplicative of Interrogatory No. 18. Without waiving this objection, Kodak responds: see Response to Interrogatory No. 18.

INTERROGATORY NO. 29:

State each and every action defendant has taken to enforce in practice its stated policies set out in Interrogatories Nos. 1, 2 and 5, including but not limited to: 1) matching owners of micrographics or photocopy equipment to purchasers of replacement parts; 2) terminating sales of replacement parts to "service bureaus," "resellers," "copy shops" or other customers who service other than their own machines; and 3) terminating sales of replacement parts to customers who resell such parts.

(a) Identify all documents concerning such actions.

(b) Identify all persons having information or knowledge of such actions.

RESPONSE TO INTERROGATORY NO. 29:

Kodak objects to this interrogatory on the grounds that it is unduly burdensome for Kodak to be required to "state each and every action," however important or trivial, taken to enforce the referenced policies. Without waiving this objection, Kodak responds as follows:

Re Copy Products: In August 1985 written guidelines were established and distributed to promote uniformity of response to requests for copier parts. See Exhibit 7 to the Murray Declaration. Subsequently, a documented process for handling requests for copier parts by entities ineligible to buy them was established. In the computer used by the Customer Service Assistants ("CSA") who receive parts orders, copier parts were designated "Controlled Distribution-5" ("CD-5"). Also, attempts were made to identify entities eligible and ineligible to buy copier parts. When a customer attempts to order a copier part, the CD-5 designation appears on the CSA's computer screen together with, if available, information as to the customer's eligibility to buy the part. If eligibility information is available the CSA determines whether to sell the part; otherwise, the order is referred to a Controlled Distribution Customer Service Assistant, who investigates the customer's eligibility and determines whether to sell the part.

Kodak attempts to identify instances in which customers buy copier parts ostensibly to service their own equipment, but actually provide them to ISOs. We have, however, no effective means to do so and have been unable to do so. Therefore, Kodak has not terminated sales of copier parts to any service bureaus, resellers,

copy shops or customers who may be providing third party service or reselling parts.

a. Responsive documents will be produced.

b. Emmett A. Gross, Lynn Brockman Gleason, Sue Atkinson, Neil W. Farrar, and others too numerous to identify.

Re BISD: BISD has also utilized CD-5 codes to alert a CSA receiving a parts order that the part has restricted distribution. Entities which have been identified as Business Equipment Non-Users ("BENUs") are not sold parts for newer products and must have their orders for older product parts cleared by a Parts Planner. See Declaration of Robert A. Lorenson at ¶¶ 8-10; see also Response to Interrogatory Nos. 8 & 9. This list is updated quarterly. As described in the Lorenson Declaration, a new procedure to identify orders from ineligible customers is being developed at this time.

Kodak attempts to identify instances in which customers buy micrographics parts ostensibly to service their own equipment, but actually provide them to ISOs. We have, however, no effective means to do so and have been unable to do so. Kodak has thus not terminated sales of micrographics parts to any service bureaus, resellers, copy shops or customers who may be providing third party service or reselling parts.

a. Responsive documents will be produced.

b. Robert A. Lorenson, Joseph M. O'Brien, Charles A. Carson, Neil W. Farrar, and others too numerous to identify.

INTERROGATORY NO. 30:

Identify each service contract or equipment sale defendant is aware of losing to plaintiffs, or any of them.

(a) State the reasons for such loss.

(b) Identify documents concerning such loss.

(c) Identify persons having knowledge or information concerning such loss.

RESPONSE TO INTERROGATORY NO. 30:

Kodak objects to this interrogatory on the ground that it seeks information which is not relevant, and which is not likely to lead to the discovery of information relevant, to this action. Plaintiffs' Complaint seeks damages for business they lost on account of Kodak's conduct, not which Kodak lost on account of plaintiffs'. Kodak also objects to this interrogatory at this time because it seeks information not relevant to the pending motion for summary judgment, in violation of Paragraph 2 of the Court's Order of September 18, 1987. Lastly, Kodak objects to this interrogatory because it is unduly burdensome. Kodak believes that it has lost business whenever plaintiffs service Kodak equipment. This has happened on many occasions at locations throughout the United States, and involves dozens of Kodak employees. The occasions when this has occurred are, of course, known to plaintiffs, and they have much better access to information about these occurrences than Kodak does.

a. Not applicable. Kodak further objects to this subparagraph on the ground that it calls for speculation,

since the reasons for any such loss are known to the customer making the decision, not to Kodak.

b. Not applicable.

c. Not applicable.

Dated: October 26, 1987.

Respectfully submitted,

McCUTCHEN, DOYLE,
BROWN & ENERSEN
DONN P. PICKETT
DANIEL M. WALL
ALFRED C. PFEIFFER, JR.

By /s/ Donn P. Pickett
DONN P. PICKETT
Attorneys for Defendant
Eastman Kodak Company

VERIFICATIONS

STATE OF NEW YORK)
) ss:
COUNTY OF MONROE)

EDGARD J. GRECO, being first sworn, says that he is Vice President and General Manager, Business Imaging Systems Division, Eastman Kodak Company, and states on information and belief that the Answers to Plaintiffs' First Set of Interrogatories herein, to they extent they relate to the activities of the Business Imaging Systems

Division, were prepared from company sources, including its books and records, and that he believes them to be true.

/s/ Edward J. Greco

Sworn to me this 22nd day of October, 1987.

/s/ Luanne Cenci
Notary Public

LUANNE CENCI
Notary Public in the State of New York
MONROE COUNTY
My Commission Expires 8/31/89

STATE OF NEW YORK)
) ss:
COUNTY OF MONROE)

CHARLES L. TROWBRIDGE, being first sworn, says that he is Vice President and General Manager, Copy Products Division, Eastman Kodak Company, and states on information and belief that the Answers to Plaintiffs' First Set of Interrogatories herein, to they extent they relate to the activities of the Copy Products Division, were prepared from company sources, including its books and records, and that he believes them to be true.

/s/ Charles L. Trowbridge

Sworn to me this 21st day of October, 1987.

/s/ Jonathan W. Romeyn
Notary Public

JONATHAN W. ROMEYN
Notary Public in the State of New York
MONROE COUNTY, N. Y.
My Commission Expires Feb. 28, 1990

EXHIBIT A

LIST OF NON-USERS

A.A.A. MICRO, INC.
1795 RIVER SIDE ROAD
ROSWELL, GA 30076

A-ABC APPLIANCE
2206 N.W. LOOP 410
SAN ANTONIA, TX 78230

AALPHA MICROGRAPHICS
3117 20TH STREET
SAN FRANCISCO, CA 94110

A.B.E. ELECTRONIC/BUSINESS
831 WOOD STREET
BETHLEHEM, PA 18018

ADR MICROFILM SERVICES
P.O. BOX 161372
AUSTIN, TX 78176-1372

ADVANCED MICROGRAPHICS
30429 W. 8 MILE RD.
LIVONIA, MI 48152

ADVANCED SYSTEMS SVS. INC
1525 WEST BAYAUD
DENVER, CO 80223

A&E ENTERPRISES
1507 NORTH PORTLAND AVE.
OKLAHOMA CITY, OK 73107

MR. ALEX RODRIGUEZ
517 PARK TOWN DRIVE
BEER PARK, TX 77536

ALLIED TECHNOLOGY
7800 BISSONNETT, SUITE 160
HOUSTON, TX 77074

ALLSTATE MICROFILM
801 E. BALL ROAD
ANAHEIM, CA 92805

AMERICAN MICROFILM SVC.
120 W. ILLINOIS
CHICAGO, IL 60610

AMTECH EQUIP. MAINT.
P. O. BOX 75013
ST. PAUL, MN 55175

ANACOMP
100 PRESTIGE PARK RD.
E. HARTFORD, CT 06108

APPIED MICROFILM
2175 DE LA CRUZ BLVD.
SANTA CLARA, CA 95050
408/727-6371

A.R.S.
815 NORTH CENTRAL, SUITE F
MEDFORD, OR 97501

ART SERVICE OFFICE
197 HAVAMEYER
NEW YORK, NY 11211

ATLANTA GENERAL MICROFILM.
3060 PHARR CT.
ALTANTA, GA 30305

AUSTIN MICROGRAPHICS
2008 OXFORD
AUSTIN, TX 78704

BCS INC.
1517-C S. SHERIDAN RD.
TULSA, OK 74112

BCS INC. & BCS TECH. SERV.
1285 W. BYERS PLACE
DENVER, CO 80223

BMI
KANSAS CITY, MO

BOB ENGLE INC.
405 THOMPSON AVE.
EXCELSIOR SPR., MO 64024

BRIGHTMAN HOME CTR.
3739 N. BROAD STREET
KANSAS CITY, MO 64102

B.S.P.I.
1507 N. PORTLAND
OKLAHOMA CITY, OK 73107

MR. D. BUSH
1061 SOUTH CRAIG
SPRINGFIELD, MA 65804

BUTLER BUSINESS SYSTEMS
1440 CHATTAHOOCHEE AVENUE
ATLANTA, GA 30318

CAM-DEX
1600 GENESEE STREET
KANSAS CITY, MO 64102

CAPITAL MICROFILMING
7950 ANDERSON SQUARE
SUITE 108
AUSTIN, TX 78744

CAPITOL TECHNIGRAPHICS
8002 D-HAUGE COURT
SPRINGFIELD, VA 22150

CATALINA SPECIALITY
4709 BAYSIDE DRIVE
AUSTIN, TX 78744

CERTEX
3705 SOUTH JENSION STREET
ENGLEWOOD, CO 80110

CHARLES NORDSTROM
1117 128TH AVE.
NE BLAINE, MN 55434

CHECKWRITER COMPANY
251 WEST 30TH STREET
NEW YORK, NY 10001

COLORADO BUSINESS MACHINES
3430 TWEETY BOULEVARD
SOUTHGATE, CA 90280

COM MICROFILM
1017-19 W. LAWRENCE
SPRINGFIELD, IL 62704

COMPUTER DYNAMICS
4900 RICHMOND SQUARE
OKLAHOMA CITY, OK 73118

COMPUTER PERIPHERAL SERVICES
11814 GOLDEN PINE
HOUSTON, TX 77070

COMSTOR
111 NORTH 56TH STREET
LINCOLN, NE 68505

COMSTOR PRODUCTIVITY CTRS.
111 N. 56TH SUITE 206
LINCOLN, NE 68508

CONCEPT MICROFILM
3337 REPUBLIC AVE.
MINNEAPOLIS, MN 55420

CUSTOM MICROFILM
6422 SAN FERNANDO ROAD
GLENDALE, CA 91201

DATA IMAGE, INC.
5462 S. 94TH E. AVENUE
TULSA, OK 74145

DATA TRADE CORPORATION
1780 NW 7TH
MIAMI, FL 33125

D.K.M. MICROSERVICES, INC.
6804 TORRESDALE AVENUE
PHILADELPHIA, PA 19135

ELECTRONIC MICROFILM SPEC.
(EMS)
5713 AMETHYST
ALTA LOMA, CA 91201

EMS
ELECTRONIC MICROFILM SVC.
5713 AMETHYST
ALTA LOMA, CA 91701

EQUIPMENT MICROGRAPHICS
905 TRURO LANE
CRAFTON, MD 21114

EQUIPMENT WHOLESALERS
576 HANOVER
AURORA, CO 80010

EXECUTIVE MICROFILM SERV.
2709 WILLARD ROAD
RICHMOND, VA 23229

FISHER MICROGRAPHICS
12261 BELLENTONTAIRE ROAD
ST. LOUIS, MO 63138

FLORIDA MICROFILM
HWY. 231 S.
DOTHAM, AL 36301

FREDERICK LUTHER CO.
2803 E. 56 CT.
INDIANAPOLIS, IN 46220

G. & G. MICROGRAPHICS 7/31/87
217 WEST COMMERCIAL STREET
SPRINGFIELD, MO 65803

G&S ELECTRONICS
13375 RAMONA
CHINO, CA 91710

GREAT LAKES MICROFILM
4417 S. ARCHER
CHICAGO, IL 60632

H. NOYD MICROFILM
225 N. MAIN STREET
NORTH CANTON, OH 44720

HOSPITAL MICROFILM
386 HONNICUTT ROAD
MAPLETOWN, GA 30059

IMAGE SYSTEMS
803 W. FRONT STREET
TRAVERSE CITY, MI 49684

IMAGES MICROFILM SVC.
3433 ILOSSMOOR ROAD
HOMEWOOD, IL 60430

INDEPENDENT MICROFILM CO.
1821 EASTBROOK SE
ISLAND RAPIDS, MI 49508

INFOGRAPHICS
23077 GREENFIELD ROAD
SOUTHHELD, MI 48075

INFORMATION SYSTEM MAINT.
2915 CLASSEN BLVD. SU. 175
OKLAHOMA CITY, OK 73106

INMAN SUPPLIER & SVC.

SPRINGFIELD, MO 65800

ITS
4443 AUBURN BLVD.
SUITE N
SACRAMENTO, CA 95841

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4600 W. STREET
LINCOLN, NE 68503

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1512 WEST 34TH STREET
HOUSTON, TX 77018

JANIS LEATH
504 MELTON DRIVE #6
CHEYENNE, WY 82009

J-E-S-P COMPANY INC.
77 MILLTOWN ROAD
E. BRUNSWICK, NJ 08816

JORM MICROLAB
1101 27TH AVE. SW
CEDAR RAPIDS, IA 52404

KANSAS BUSINESS SYSTEMS
201 N. ST. FRANCIS
WICHITA, KS 67200

KEN MEYERS
7015 FORREST WAY
SAN ANTONIO, TX 78240

KEY MICROGRAPHICS
1617 MAIN STREET
WICHITA, KS 64108

KEYSTER KOM COMPANY
119 N. HARRISON
ALEXANDRIA, IN 46001

KLR AUDIOVISUAL INC.
2929 MONTE VIS
ALBUQUERQUE, NM 87100

LA MODERNA OFFICE TRONICS
197 HAVAMEYER
NEW YORK, NY 11211

LOYOLA NOTRE DAME LIBRARY
200 WINSTON AVE.
BALTIMORE, MD 21212

LYNN MICROFILM
350 TERRELL DRIVE
MARRIETTA, GA 30064

MANAGEMENT RESOURCES PROJECTS
1703 INDUSTRIAL DRIVE
EXCELSIOR SPRINGS, MO 64024

MARTINS MICROFILM
2022 PREYWAY 104
CORPUS CHRISTI, TX 78412

MERELCO, INC.
813 N. MAIN STREET
SEMINOLE, OK 74868

METRO MICROGRAPHICS
1806 WEST STASSNEY LANE
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MICRO DATA
FAIRPORT, NY

MICRO IMAGE
6539 LYNNGATE DRIVE
SPRING, TX 77373

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BURBANK, IL 60459

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ABILENE, TX 79602

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BETTSVILLE, ML 20705

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LANSING, MI 48910

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SOUTH HOLLAND, IL 60473

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TYLER, TX 75703

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HATFIELD, PA 19440

MICROGRAPHICS SERVICE
113 CLEMENS COURT
LANSDALE, PA 19446

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2519 WEST, I-40
OKLAHOMA CITY, OK 73101

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931 N. WALNUT
REPUBLIC, MO 65738

MICROIMAGE TECHNOLOGY INC.
327 S. LASALLE STREET
CHICAGO, IL 60604

MICROMATION SERVICES
5TH - CHESTNUT STREETS
PHILADELPHIA, PA 19106

MICROPLAN, INC.
121 WEST DERVEY
WICHITA, KS 67202

MICROPLEX (3/12/87)
607 CEDAR STREET
CEDAR HILL, TX 75104

MICROPROCOL LIMITED
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MICRO-SECURITY INC.
129 WEST B. STREET
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615 S. STEPHENSON
IRON MOUNTAIN, MI 49801

NORTHEAST MICROGRAPHICS
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BRANFORD, CT 06405

NORTHWEST MICROFILM, INC.
SPAGUE-RITCHEY ROADS
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OMNI MICROGRAPHICS, INC.
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MILPITAS, CA 95035

PICARO MICROFILM
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HOUSTON, TX 77074

PHILA MICROGRAPHICS
158 GAITHER DRIVE
MT. LAURIE, NJ 08054

PHOTOGRAPHIC EQUIPMENT SERVICE
2016 CATHEDRAL WAY
MOBILE, AL 36609

PIONEER MICROFILMING
228 S. MILL STREET
S. LYON, MI 48178

PRECISE MICROFILM
45 VASSON ROAD
FEEDING, MA 01030

PROFESSIONAL MICROGRAPHICS
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MCALLEN, TX 78501

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9520 GRAVIOS
ST. LOUIS, MO 63123

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7100 NW 63RD
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12198 CR 250
SURANGO, CO 81301

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1271 W. LITTLETON BLVD.
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TRUMBULL, CT 06611

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P. O. BOX 37456
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HOUSTON, TX 77018

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2470 JOEFIELD ROAD
DALLAS, TX 75229

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8300 PROFESSIONAL PL.
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4911 CALIENTE
ARLINGTON, TX 76017

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MIAMI, FL 33166

ST. LOUIS PHOTO SUPPLY COMPANY
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ST. LOUIS, MO 63103

JIM STEMPERT
496 SEDGWICK AVENUE
STARDFORD, CT 06497

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10-9 1/2 STREET SE
ROCHESTER, MN 55904

TEL-S CORPORATION
11224 WILCREST GREEN DRIVE
HOUSTON, TX 77042

TEL-S CORP. OR DALLAS
P. O. BOX 828
CEDAR HILL, TX 75104

TEXAS PRECISION IMAGE
2101 GOLDEN ROAD
TYLER, TX 75701

THE ARLYN CORP.
208 S. PULASKI STREET
BALTIMORE, MD 21223

THE REX CORP.
1840 N. MICHIGAN
SAGINAW, MI 48602

THE UNION SUN JOURNAL
459 S. TRANSIT STREET
LOCKPORT, NY 14094

TYPE AND TURBINE COMPANY
115 E. RENTON STREET
PHARR, TX 78577

UMICO
405 THOMPSON AVE.
EXCELSIOR SPRINGS, MO 64024

VARI SERV. CO.
626 HILLCREST DRIVE
WESTFIELD, IN 46074

VIKING MICROFILM (3/12/87)
39 SARAH DRIVE
EAST FARMINGDALE, NY 11735

WAYNE BARNES
6226 E. LATIMOR STREET
TULSA, OK 74115

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3839 WASHINGTON AVE. N.
MINNEAPOLIS, MN 55412

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. **EASTMAN KODAK COMPANY,** Defendant.	**NO. C 87 1686 WWS** **PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

PLEASE TAKE NOTICE that, pursuant to Rule 34, Federal Rules of Civil Procedure, defendant **EASTMAN KODAK COMPANY** is requested to produce for inspection and copying all documents described herein on or before November 5, 1987 at the Law Offices of James A. Hennefer, 220 Sansome Street, Fourteenth Floor, San Francisco, California 94104.

In responding to this request for production of documents the following definitions and instructions shall be deemed applicable:

DEFINITIONS

The terms listed below will have the meanings indicated unless the context requires otherwise.

1. **"Kodak"** or **"Defendant"** means defendant herein, the Eastman Kodak Company, a New Jersey corporation, and any of its divisions, subsidiaries, directors, officers, servants, agents, employees, or representatives and each of them.

2. **"Plaintiffs"** means the plaintiffs herein, and their partners, directors, officers, servants, agents, employees or representatives, and all or each of them, as the case may be.

3. **"Micrographics Equipment"** means the mechanisms manufactured by Kodak and used for the reduction of information to a microform containing microimages too small to be read without magnification or enhancement, and used for the storage and retrieval of a hard copy of such information, including, but not limited to microfilmers, processors and retrieval and printing devices, both manual and computer-aided systems, and computer output to microfilm system.

4. **"Photocopy Equipment"** means the mechanisms manufactured by Kodak and used for the reproduction of a hard copy of written or graphic material through a photoconductive process. These include, but are not limited to Kodak Ektaprint models 100, 150, 200, 250, 300 and 350 and related accessories.

5. **"Replacement parts"** means component parts of micrographic or photocopy equipment, as the case may be, for use in the servicing, repair, reconditioning or upgrading of such equipment.

6. **"BISD"** means Kodak's Business Imaging Systems Division which manufactures and markets micrographics equipment and sells replacement parts for such equipment.

7. **"CPD"** means Kodak's Copy Products Division which manufactures, remanufactures and markets photocopy equipment and sells replacement parts for such equipment.

8. **"CESD"** means Kodak's Customer Equipment Services Division which provides after-sale service for Kodak micrographics and photocopy equipment.

9. **"EMA"** means "Equipment Maintenance Agreement" which is Kodak's service contract with owners or lessees of Kodak micrographics or photocopy equipment in which Kodak agrees to service and repair the equipment for a fixed amount of money over a period of time.

10. **"Per-Call"** means Kodak's arrangement for service and repair of micrographics and photocopy equipment in which Kodak charges the owners or lessees of such equipment time and materials for such service and repair.

11. **"ISO"** means "independent service organization", which is an entity not affiliated with Kodak that offers third party service and repair for micrographic and/or photocopy equipment.

12. **"OEM"** means "original equipment manufacturer," which is an entity that produces replacement parts for Kodak, whether that entity originally produced that part for Kodak to use in the assembly of its new micrographic and/or photocopy equipment or not.

13. **"Conversation"** means any oral communication, whether formal or informal, whether face-to-face or by means of telephone or other electronic transmission, occurring at any time or place and under any circumstances whatsoever, in which information of any nature was stated, transmitted, or transferred.

14. **"Document"** means all original writings of any nature whatsoever and any nonidentical copies thereof in Defendant's possession, custody or control, or available to it, regardless of where located, and includes, but is not limited to contracts, agreements, memoranda, tape recordings, letters, correspondence, diary entries, reports, contact sheets, studies, summaries, minutes of board or committee meetings, notes, jottings, bulletins, notices, announcements, instructions, charts, manuals, brochures, schedules, telephone logs, telephone toll records, telegrams, teletypes, results of investigations, licenses, ledgers, books of account, charge slips, receipts, stenographers' notebooks, desk calendars, appointment books, computer data, written communications between, to or among officers or directors, financial calculations, partial or complete reports of telephone or oral conversations, preliminary or final drafts of any of the foregoing, and all other writings or recordings of any kind, regardless of their nature or author. In cases where original and/or nonidentical copies are not available, "document" also means nonidentical copies of original documents and copies of nonidentical copies.

15. **"Meeting"** means any encounter involving two or more persons, whether formal or informal and whether scheduled in advance or accidental.

16. **"Concern(s)" or "concerning" includes referring to, alluding to, responding to, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, mentioning, reflection, analyzing, constituting, evidencing or pertaining to.**

INSTRUCTIONS

1. Production of Documents In Possession, Custody or Control Required.

In producing these documents, you are requested to furnish all documents known or available to you, regardless of whether these documents are possessed directly by you or your agents, employees, representatives, investigators, or by your attorneys or their agents, employees, representatives or investigators.

2. Documents Must Be Produced In Full.

If any of those documents cannot be produced in full, produce to the extent possible, specifying the reasons for your inability to produce the remainder and stating what information, knowledge, or belief you do have concerning the unproduced portion.

3. Objections to Production Must Be Stated and Documents Not Produced Listed.

If the production of any document herein is objected to on the grounds that such document is a confidential communcation protected by the attorney-client privilege, or is protected by the attorney work-product privilege,

furnish a list of all such documents as to which a privilege is claimed so that the Court may make a determination as to whether the privilege claimed is applicable.

4. Lost or Destroyed Documents Must Be Listed.

If any of these documents have for any reason whatsoever been destroyed, lost, or withheld, specify the reason(s) for such withholding, loss or destruction and state what information, knowledge, or belief you do have concerning the lost, destroyed or unproduced documents, including a list of such documents.

5. Production of Originals, Copies, and Photocopies Required.

You are requested to produce all copies and photocopies as well as originals, whether signed or unsigned.

6. Production of Prior Drafts Required

You are requested to produce all prior drafts as well as the final form, of all documents.

You are requested to produce all documents whether or not previously produced for copying and inspection in this litigation.

REQUEST FOR DOCUMENTS

The following requests, unless they specify otherwise, refer to the time period from April 13, 1983 to present. You are requested to produce:

1. All documents concerning Kodak's identification of specific ISO's or other entities to whom it would not sell replacement parts or on whom it would place restrictions on the terms and conditions for the sale of replacement parts. These documents should include without limitation:

a) The requests within Kodak for Kodak personnel to identify such ISO's or other entities.

b) The responses to such requests.

2. All documents concerning the policy and operating instructions given to Kodak personnel at Kodak Parts Services for receiving and filling replacement parts orders or for refusing to fill or delaying replacement parts orders. These documents should include, without limitation:

a) Documents showing the mechanism or the criteria for differentiating between classes of customers including but not limited to ISO's and direct purchasers of Kodak micrographics or photocopy equipment; and,

b) Documents showing the filling and shipping of orders for the various classes of customers and various types of replacement parts (e.g. normal parts vs. "all time" parts).

3. All annual profit and loss statements showing revenues and costs for:

a) Sales of new Kodak micrographic and photocopy equipment.

b) Sales of used or reconditioned Kodak micrographic and photocopying equipment.

c) Supplies for Kodak micrographic and photocopy equipment.

d) Replacement parts for Kodak micrographic and photocopy equipment.

e) Service for Kodak micrographic or photocopy equipment.

4. All documents concerning the sources of replacement parts, including but not limited to identification of parts produced by Kodak and parts produced by OEM's (including identification of each OEM).

5. All documents concerning the acquisition cost to Kodak of replacement parts.

6. All documents concerning contracts or agreements with the following entities concerning the production for Kodak of replacement parts and sale of those parts to entities other than Kodak.

1. Merkel Motor Company, Chicago, Illinois

2. Bodine Electric Motor Company, Chicago, Illinois

3. Acme Electric Company, Rochester, New York

4. Barber Colman Company, Rockford, Illinois

5. Sylvania Corporation, Danvers, Massachusetts

6. Electro Craft Corporation, San Jose, California

7. Belting Industries, Kenilworth, New Jersey

7. All documents concerning inventories of replacement parts on hand at Kodak.

8. All documents concerning inventory levels needed to satisfy repair needs for micrographics and photocopy equipment with regard to "Kodak's authorized dealers, distributors, service outlets, Kodak Customer Equipment Services Field Engineers and Equipment Service Centers, Government users and others who purchased equipment directly from Kodak".

9. All documents concerning identification and inventories of, and restrictions on "all time" parts, as the term "all time" was used in a letter dated July 15, 1986, attached as Exhibit 1 to the Declaration of Robert A. Lorenson filed in this action on August 14, 1987.

10. All documents concerning the growth of ISO's, including but not limited to documents identifying the amount of micrographics and photocopy repair business of ISO's the "losses" of such service business by Kodak to ISO's, and market shares of such service.

11. All documents concerning reports from the field of competition from ISO's for Kodak's service of micrographics and photocopy equipment.

12. All documents concerning complaints by owners of Kodak micrographics or photocopy equipment about ISO service.

13. All documents concerning restrictions Kodak places on the resale or use of replacement parts sold to equipment owners who purchased their equipment directly from Kodak.

14. All documents concerning the sale of replacement parts to "service bureaus" who provide contract

micrographics services, to "resellers," or, to "copy shops."

15. All documents concerning the patterns of purchases and/or ownership of Kodak micrographic and photocopy machines including, but not limited to numbers of Kodak machines owned by each entity, and the frequency of new purchases by an existing customer.

16. All documents concerning prices charged, (whether for accounting purposes or actually received) for all micrographics and photocopy replacement parts:

(a) Used to fullfil EMA's;

(b) Used on a "per-call" basis;

(c) Sold to third parties for their own use.

17. All documents concerning the prices charged by Kodak for EMA's for micrographics and photocopy equipment.

18. All documents concerning the trade-in policy and practice of Kodak for its own or other brands of micrographics and photocopy equipment.

19. All documents concerning the number of pieces of equipment, trade-in value, and use of actual trade-in micrographics and photocopy machines received by Kodak.

20. All documents concerning charges made for inspection and repair of micrographics and photocopy repair equipment, which was formerly serviced by Kodak, under the policies set out in Exhibits 7 and 8 to the Declaration of Michael J. Murray and in Exhibit 1 to

the Declaration of Emmett A. Gross, both filed in this action on August 14, 1987.

21. All documents concerning the useful life, or the actual average or expected length of ownership for micrographics and photocopy equipment.

22. All documents specifically naming plaintiffs, or any of them, which concern their businesses in competition with defendant.

Dated: September 25, 1987

LAW OFFICES OF
JAMES A. HENNEFER

/s/ James A. Hennefer
JAMES A. HENNEFER
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, v. EASTMAN KODAK COMPANY, Defendant.	No. C 87 1686 WWS ORDER

A conference was held in this matter by telephone on December 21, 1987 at 3:30 p.m., at which time counsel for the parties were heard regarding possible further discovery necessary for the plaintiffs to respond to defendant Eastman Kodak Company's pending motion for summary judgment. Having heard the arguments of the parties and good cause appearing therefor, the Court hereby ORDERS:

1. The revised briefing schedule on defendant's motion for summary judgment shall be as follows:

a. Plaintiffs shall file their response to defendant's motion on or before January 29, 1988;

b. Defendant shall file its reply brief on or before February 12, 1988;

c. The hearing will take place on February 26, 1988, at 11:00 a.m.

2. Without altering the above-described briefing schedule, plaintiffs shall be given the opportunity to take the depositions of no more than two additional deponents who can provide testimony regarding the issue of market power raised in defendant's motion for summary judgment.

3. Without altering the above-described briefing schedule, defendant will, upon specific requests by plaintiffs, provide plaintiffs with the source, author and/or date, if ascertainable, of any documents already produced to plaintiffs by defendant.

4. In connection with their response to defendant's motion for summary judgment, plaintiffs may move this Court, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, for the opportunity to obtain further discovery relevant to the issues raised by and material to defendant's summary judgment motion. Any request for additional discovery should be accompanied by an explanation of the relevance of the requested information to the issues raised by and material to defendant's motion for summary judgment.

IT IS SO ORDERED.

Dated: 1/4/87

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

Approved as to form:

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT KODAK'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Eastman Kodak Company's ("Kodak's") Motion for Summary Judgment is based upon: (1) The ignoring of the relevant material facts and the statement of half-truths; (2) economic theory that is flawed, unprecedented and has no basis in financial reality; and (3) legal theories that are incorrect as a matter of law.

I. Factual Inaccuracies

A. Kodak's "Policies/Practices" Are Different From those Stated, In Intent Application And Competitive Effect

Kodak's restrictive parts policy (and the application, practice and enforcement of that policy) is truly a wolf in sheep's clothing. The policy is not one designed (as Kodak contends) to sell parts "only to direct Kodak equipment customers" but in practice is one designed *not* to allow the sale of any parts (directly or indirectly) to its service competitors as a means of driving them out of business. Kodak has sold, and does sell most Kodak micrographics parts to *anyone*, without restrictions, except those identified as "BENU'S" ("Business Equipment Non-Users" – a Kodak acronym directly equated with Kodak independent service competitors ("ISOs")). Kodak has instituted "tiger teams" to ferret our BENUs. BENU's parts are then severely restricted (as to older equipment parts), or totally cut off (as to newer and "all time" equipment parts). As to Kodak photocopy parts, Kodak's practice (which was different from its stated policy) was to cut off sales of parts to service competitors altogether in 1985. Kodak, in addition, has used threats of termination of parts to "direct Kodak equipment customers" or others who resell parts to Kodak service competitors or who compete in photocopy service with Kodak. Kodak has leveled slanderous allegations of ISO's stealing parts and dealing in "stolen" parts, and has used Kodak's "security" forces to illegally confiscate parts – all in an attempt to prevent these parts from getting to their competitors. In a word, Kodak's parts policy is *predatory* –

predatory against any service competitor. It is not a unilateral internal profit and loss business decision on how to resell parts by Kodak.

B. Kodak Micrographics and Photocopy Machine Owners Are Locked In

Kodak's repeated statements that with "interbrand" competition "Kodak equipment *buyers*" could switch to other manufacturers' products is grossly misleading. The relevant question is actually whether Kodak equipment *owners*, with large capital investments, low residual equipment prices, and high costs in switching microfilm, applications software and other costs associated with a change of ownership, can, as a practical matter, switch brands when faced with supra-competitive prices or conditions on Kodak service.

Kodak's simplistic analysis that a micrographics user has the "option to employ hard copy" or would spend hundreds of thousands or even millions of dollars in reprocessing its data, redeveloping its software, purchasing new equipment and retraining its operators in order to avoid supra-competitive pricing for Kodak service is totally unrealistic. Likewise, to say that a Kodak Ektaprint copier owner who has, for example, invested $75,000 in a copier within the last five years and the residual value of that equipment on the open market is $2500 may "easily thwart any such attempt (to extract monopoly profits) by switching to Xerox, IBM, Cannon, Bell and Howell, 3M or some other manufacturer's equipment" where Kodak service costs are $2,000 to $3,000 per

year above a competitive level is, again, totally unrealistic.

As a practical matter these *owners* of Kodak equipment, through Kodak's carefully designed, maliciously implemented anti-competitive policies are locked into ownership of Kodak machines.

C. Kodak Is Attempting To Be A "Free Rider", Not Kodak Service ISO's

Kodak's repeated allegations that ISOs are "free riders", could not be further from the facts. ISOs do "bear all of the associated expenses" for obtaining parts. Kodak, in about 90% of its parts merely buys parts from its parts suppliers and passes all of its costs (and a healthy profit) on to ISOs.

The parts business for Kodak is a very profitable one. ISOs often pay Kodak *double* what other wholesalers (when they can also obtain these parts from Kodak's suppliers) sell these parts for. ISOs are charged double the internal charge to Kodak equipment service representatives ("ESR's") for the same parts. ISOs carry inventory of parts portionally larger than Kodak's, (one ISO is turning its parts every three years, whereas Kodak turns its parts every sixty days). Under Kodak's new "policy" ISO's pay an additional 10% premium on all parts. The expense to Kodak of ferreting out "BENU's" has greatly exceeded any imaginary savings from parts demands – and in the process exposed Kodak's anti-competitive intent.

D. Kodak's Prices For Micrographics and Photocopy Service Are Not Competitive

Kodak's factual allegation that "interbrand" competition prevents "monopoly profits" in Kodak micrographics and photocopy service simply does not comport with reality. In micrographics, for example, Plaintiff Image Technical Services ("ITS") is providing service for approximately $100,000 (at a profit in excess of 50%) for a customer which Kodak had charged over $200,000. (The customer, a health claims processor Computer Science Corporation ("CSC"), is "locked in" to an expensive hardware/software Kodak micrographic system with over 100 pieces of equipment.)

In the photocopy area a standard Kodak EMA for an Ektaprint 150 AF copier sold for $28,968 per annum. An equivalent contract, for the Xerox 1075 cost approximately $9,800 per annum. Kodak can maintain these monopoly profits servicing its own equipment only so long as there are no ISO competitors. The development of large numbers of Kodak micrographics service competitors in the early 1980's and the onset of Kodak photocopy service competitors is precisely what Kodak, in the last two years, by its current policies and vicious enforcement practices, intends to destroy. Kodak representatives have so stated.

E. Anti-Competitive Effects Of Kodak's Challenged Business Practices

Kodak's statement that "Kodak's challenged business practices could not have had any anti-competitive effects

on Kodak's or Plaintiff's customers," is simply absurd. The monopoly profits Kodak had exacted for inferior service at CSC, before the competition of ITS, are but one example of how a machine *owner* will choose to pay supra-competitive prices for Kodak service without ISOs' competition. Consumers of service (Kodak equipment *owners*) will inevitably be harmed by the limited choice of service providers (as ISOs are destroyed) because they are denied the opportunity to contract for lower prices, and to bargain for better service. Kodak will be able to derive, again, supra-competitive prices. Its service profits will be limited only by the cost of switching equipment, data applications, software and operators for equipment owners, which, in proportion to the cost of service, is astronomically high.

II. Economic Flaws

A. Kodak's "Market" Theory Is Economically Unviable and Unprecedented

Kodak's novel and unprecedented economic theory is that the "market" should be defined by everything that a defendant does. It glibly states, without proof, that "as far as Kodak is concerned, it does not compete in any service markets" but that "service is simply a part" of its business of manufacturing copiers and imagining equipment. This strange assertion leads to several conclusions contrary to economic reality.

First, this would mean that there is a different product market depending upon who the defendant is, and what that defendant does – even where different defendants manufacture the same type of equipment.

Second, it would mean that Kodak *does not* compete with the plaintiff ISOs but that the plaintiff ISOs *do* compete with Kodak. It is absolutely clear that Kodak competes directly with plaintiff ISOs. Plaintiff ISOs, particularly in the micrographics area, where parts supplies have, in the past, been more readily available (and in which market there are more ISOs), directly constrain Kodak's ability to obtain supra-competitive prices for their service. Where ISOs have developed in Kodak copiers, this is true also.

Third, Kodak's interbrand market theory simply ignores the fact of the choices which, in reality, confront an equipment owner. There are two tiers to the market. One tier at which Kodak can compete for the prospective *purchasers* of new units and systems with other manufacturers, while at the second tier, Kodak can destroy its competitors in the service market – to wit, ISOs like plaintiffs. Consumers, realistically, usually choose not to replace their equipment and not to avail themselves of the "interbrand competition" where the supra-competitive price at the second or service tier is disproportionately small to the losses they would incur in replacing their equipment.

B. Kodak As A Manufacturer Is Not Economically Entitled To All Profit From All Associated Aftermarkets

Kodak's second unprecedented and novel, but flawed, theory of economics is that a manufacturer of equipment is entitled to reap monopoly profits on all

lines of business related to its natural monopoly in equipment manufacture.

That an efficient manufacturer of equipment somehow has some divine right to reap profits from an inefficiently run replacement parts business or inefficient servicing of that equipment is novel indeed. Kodak, not the ISOs it threatens to put out of business by its policies in this action, is the culprit promoting Kodak's oft-relied-upon spectre of "Japanese competition." Inefficient, high-priced, lower quality service, which has often occurred on Kodak equipment without the competition of plaintiff ISOs, will do more to promote the demise of American industry than the stiff competition of small, independent service organizations like plaintiffs.

III. Legal Flaws

A. The Service Market For Kodak Equipment May Exist As a Matter of Law

There are scores of disputed facts about the market, as set out herein. Kodak is thereby forced: 1) either to avoid the obvious market of service for Kodak equipment; or, alternatively, 2) to contend that it does not exist as a matter of law. This argument ignores the black letter anti-trust law that market determination is "fact specific." It ignores cases factually similar to this where it was held that the service of Bell & Howell micrographics equipment was a relevant market, and that the service of IBM systems was a relevant market. *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986) *modified* 810 F.2d 1519 (1987); *C.E. Services v. Control Data Corp.*, 759 F.2d 1241 (5th Cir. 1985).

B. Kodak Has Market Power In The Service Markets

Solely by defining the markets as "interbrand" markets for all "imaging" or "copying" functions, Kodak arrives at the conclusion that it has no "market power" in the relevant markets. A correct definition of the "markets" as the markets for Kodak micrographics service and Kodak photocopy service disposes of Kodak's assertion of the lack of "market power." Kodak has over 80% of the Kodak micrographics service and over 95% of the Ektaprint copier service in the United States. The black letter anti-trust law definition of market power is: (1) the ability to raise prices; and (2) the ability to exclude competitors. The facts show, and Kodak's own documents admit, that ISOs can service Kodak micrographics equipment often for 50% of the supra-competitive prices Kodak can obtain without ISO's competition. In photocopy service, Kodak has been able to charge up to the *triple* competitive rates without ISOs' competition. Kodak has the power to raise prices.

Kodak has successfully been able to charge such supra-competitive prices by restriction of its parts. It has already prevented ISO's in the Kodak photocopy market from developing, and has restricted and even driven some ISO competitors in Kodak micrographics service out of business. Kodak has the ability to exclude competitors.

C. This Is Not A Simple "Dealer Termination" Case As In Calculators Hawaii Or Bushie

Kodak's attempts to stretch the decisions in *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972) and

Calculators Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1332 (9th Cir. 1983), (which were simple dealer termination/substitution cases) to cover this case where Kodak has, with predatory intent and anti-competitive effects, sought to destroy all competition in a national market, are far off the mark.

The action with regard to the local dealership in *Calculators Hawaii*, unlike Kodak's policy here, did not evidence an intent to monopolize and was not intentionally predatory. Exactly the opposite is the case with Kodak's nation-wide and industry-wide policy to restrict all competition in the Kodak service industry, its stated intent to control this entire service industry, and its predatory practices. *Calculators Hawaii*, likewise did not involve large and expensive pieces of equipment and computer applications to which customers are "locked in," as here, so that interbrand competition was a viable theory.

In *Bushie*, plaintiff failed to allege or show how the active interbrand equipment competition "did not restrict the exercise of monopoly power in servicing of Stenocord machines." This is not the case here, where a "lock in" of Kodak customers is a factual issue, and where a showing has been made that it is not financially feasible for existing owners of Kodak machines to switch machines to "interbrand" competitors if Kodak's service prices are supra-competitive. *Digidyne Corp. v. Data General Corp.* 734 F.2d 1336, 1342 (9th Cir. 1984). The *Dimidowich v. Bell and Howell, supra* case also does not support Kodak's case, but rather reinforces plaintiffs' case for a "service" market, the Ninth Circuit having recognized just such a market in that case.

D. There is "Competitive Injury" under Aspen

Kodak's argument that there is no "competitive injury" to the service market, in terms of the standard set out in *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 105 S.Ct. 2847, 2859 (1955) is clearly wrong when reference is made to the facts in this case. By the standard in *Aspen*, there are clearly questions of fact as to whether there is detriment to the consumers of service for Kodak machines in terms of price, quality and availability of the product at issue.

E. Kodak Service And New Machine Purchases Are Both Tied To Parts

Plaintiffs' tie-in theories, which are supported by the facts, include: (1) that the purchasing of Kodak service is tied to Kodak parts, over which parts Kodak has developed a monopoly with its suppliers; and (2) that new Kodak micrographics or photocopy machines bought directly from Kodak, and not through a broker or a user, are tied to Kodak parts.

Under the "separate products" test of *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551 (1984), replacement parts, service and new equipment each constitute separate products. Kodak has over 99% of the Kodak replacement parts market, and can, and does, maintain supra-competitive prices for these parts. Where many Kodak micrographics and photocopy equipment users would otherwise employ ISO service, the lack of replacement parts available to ISOs has prevented them

from doing so. Where many prospective Kodak customers would purchase used equipment from Kodak brokers, the inability to get parts and service for such equipment has prevented them from doing so. The amount of business lost by Plaintiff ISOs and impacted by the ties is substantial.

F. Kodak Parts Providers/Service Bureaus/Brokers/Self-Servicers: "Group Boycott" Of ISOs

Kodak has both explicitly and implicitly made agreedments with parts suppliers and with those entities outside Kodak to whom it supplies replacement parts that these parts cannot be sold to Kodak ISOs, and that those entities will not compete with Kodak on service. In no uncertain terms, Kodak and this group of Kodak suppliers and customers refuse to deal with ISOs, largely refusing to sell them parts *at any price*. It is clear that the purpose-related factors and horizontal agreement to foreclose competitors requires applying a per se rule to this concerted refusal to deal. The "anti-competitive motive" of Kodak in preventing independent service organizations from acquiring parts is plain. *Klor's Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

G. The Dimidowich "Hydrid" Conspiracy

Kodak is selling replacement parts to "service bureaus," which are micrographics organizations who microfilm and store records for third parties. Kodak also sells replacement parts to self-services. These service bureaus offer service for Kodak micrographics equipment

to their customers, such as banks with branch offices who have reader/printers or other retrieval devices. They are also users and sellers of Kodak film and supplies.

Kodak's policy against selling newer micrographics' parts to ISOs, its limitation on "all time" parts for older micrographics' equipment and its restrictions on the sale of parts for older micrographics' equipment to ISOs, prevents these service bureaus and self-servicers from reselling and making these parts available to ISOs. Those who do are terminated by Kodak. Both Kodak and these parts customers are aware of their joint refusals to deal with ISOs. Based upon these facts, a "hybrid" conspiracy by Kodak with such service bureaus and self-servicers is shown and a violation of the antitrust laws exists. *Dimidowich v. Bell & Howell, supra.*

STATEMENT OF FACTS

I. The History of Kodak's Parts Supply And Third-Party Service.

A. Kodak's Policy on Replacement Parts.

Kodak's written parts policy through 1985, was stated to its customers in the CESD Replacement Parts Principles which stated that:

> Kodak will sell replacements parts to any party who intends to use them to repair Kodak equipment.

The clear meaning of this was that Kodak sold parts to *anyone* using them to repair Kodak machines, including independent service organizations.

Kodak admits that, with regard to micrographics' parts, there were no restrictions on the sale of parts to ISOs until the restriction on new parts announced in the April 12, 1985 memo (Exhibit 1, Gross Declaration). Kodak also sold photocopy parts to ISOs servicing Kodak Ektaprint photocopy machines. Paul Hernandez, President of ITS specifically called Kodak CESD Parts Services prior to entering the business, and requested advice on whether they would sell him parts for this purpose. He was advised they would. Thereafter he purchased such parts freely. Kodak has produced no written communication to customers evidencing a refusal to sell copier parts prior to 1985.

Other customers for Kodak parts, in addition to ITS, relied on Kodak statements, its Parts Principles, its Terms of Sale, and its longstanding practice of selling parts to "*any* party who intends to use them to repair Kodak equipment." ISOs began setting up businesses for the micrographics area, primarily, and then in the photocopy area, in reliance on this in the early and mid-1980's.

B. The Development Of Micrographics and Photocopy ISOs for Kodak Machines.

The development of independent service organizations servicing Kodak micrographics and photocopy equipment is a relatively new phenomenon. Independent service organizations had begun to compete directly against Kodak, increasing numbers in 1984 and in 1985. Prior to 1982 Kodak had serviced almost 100% of their own micrographics machines. Of the 16 plaintiffs in this action who service micrographics equipment, 12 of them

came into existence in the 1982 period or later. These ISOs began competing head-to-head with Kodak both for private and public sector contracts, posing a threat of increased competition, and, cutting Kodak's supra-competitive prices by up to 50% (Dec. Damiani ¶ 5; Dec. Hernandez, ¶¶ 9,12; Dec. Tamvacakis, ¶¶ 12,18) In the area of photocopy parts, two months after ITS was awarded State contracts in the bid process against Kodak, for the first time, parts' orders were refused. (Dec. Hernandez ¶¶ 15-17, 19-22) Because of the direct competition of ISOs, as stated by Tim Gross of CESD, ISO's service became a "concern" "relevant to both BISD and CESD *performance* in 1985." (Gross Declaration, Exhibit 1) Kodak's anti-competitive actions alleged by plaintiffs, first with the purpose to slow this growth (1985), and, then with the purpose to put ISOs out of business and out of competition with Kodak (1986), were in direct response to this development of ISOs and the challenging of Kodak's supra-competitive prices.

The brokerage of Kodak Ektaprint photocopiers is also a relatively new phenomenon. The leader in the industry, Ronald Lydick and Equipment Brokers Unlimited began business in 1982. Other such brokers, including CPO, Ltd., and International Business Equipment began business in 1985 and 1986, respectively. In response to the brokers' head-to-head competition with Kodak in an increasing number of situations in 1986, Kodak's Copy Products Division stated that Kodak would take action to put them out of the Kodak business. (Dec. Varing, ¶¶ 5-7) Subsequent actions by the Copy Products Division, like those in BISD and CESD were taken in response to competition which affected their "financial performance,"

and prevented supra-competitive prices from being realized.

C. Development of the ISO/Broker Businesses

1. Development of ISOs in Kodak Micrographics Competing With Kodak On Price and Quality.

Of the 18 plaintiffs, 16 are involved in the servicing of Kodak micrographics equipment. These service organizations are staffed largely by experienced, quality Kodak-trained technicians, (Dec. Damiani ¶¶ 5,7,13; Dec. Welch ¶ 2; Dec. Hernandez ¶¶ 3-5,17; Dec. Tamvacakis, ¶¶ 4,5) who continue to update their training. (Dec. Damiani ¶ 13; Dec. Hernandez ¶ 5;) contrary to Kodak's assertion, many ISOs maintain their own large inventories of parts. In fact, the inventory of B.C.S. Technical Services is greater than Kodak's in terms of parts turnover versus inventory. (Dec. Welch ¶ 19). The ISOs, in order to compete against the "Kodak" name, had to provide micrographics services at a higher quality and lower price.[1]

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[1] An example of the specific quality service improvement which micrographics dealers provided over Kodak service is the service provided by ITS to computer Science Corporation ("CSC") in Sacramento, California. Three of CSC's machines that had been down for six months under Kodak's service were back in service in about two weeks under ITS's service. (Dec. Hernandez ¶¶ 42-46

(Continued on following page)

(Dec. Damiani ¶ 5; Dec. Hernandez ¶¶ 9, 48-54; Dec. Welch, ¶¶ 23-25; Dec. Searle ¶ 7)[2]

2. The Development Of Kodak Ektaprint Copier ISOs and Brokers

Kodak's entry into the copier-duplicator market with the Kodak Ektaprint machine line is of recent origin, in 1975. The total population of Kodak Ektaprint copy machines, unlike Kodak micrographics machines in existence was small until the 1980's.

As a result, the demand for independent service of Kodak Ektaprint machines, and therefore the advent of Kodak Ektaprint ISO's service developed more slowly and at a later date. In fact, the number of ISOs actively servicing Kodak Ektaprint copiers around the United States is now still fewer than ten. (Dec. Varing ¶ 4) As in the micrographics industry, the new Kodak Ektaprint ISOs had to compete both on quality and price of service.

(Continued from previous page)

Another graphic example with regard to the competition ISOs give Kodak's supra-competitive prices is the CSC contract. Prior to competition by ITS against Kodak for the CSC account, Kodak was receiving over $200,000 per annum for servicing CSC's equipment. ITS, undertook to service the CSC account for just over $100,000, a reduction of 50%. (Dec. Hernandez ¶¶ 48-52)

[2] The CSC situation is a graphic example of both price and service. ITS gave CSC a $100,000 contract where Kodak was $200,000, and a full time, top technician where Kodak's was part time and left machines broken. (Dec. Hernandez ¶¶ 42-46, 48-52)

Again, they found that Kodak was obtaining supra-competitive prices for substantially lower quality service than ISOs were willing to offer.[3]

The independent brokering of Kodak Ektaprint copiers is likewise a new phenomenon. It consists of either brokering equipment "as is," or purchasing that equipment, reconditioning it and reselling it. There are only about six such brokers in the Untied States. These brokers, however, actively compete with Kodak head to head for the sale of units into account which want Kodak Ektaprint copiers. (Dec. Varing ¶ 16)

II. Kodak Micrographics and Kodak Ektaprint Copier Owners Are "Locked In" Vis-a-Vis Service

Due to a number of factors in each of the service markets, Kodak equipment owners, facing supra-competitive service charges and the tying of service and new machines to Kodak parts do not, as a practical matter, and cannot, as a matter of "economic feasibility," change their equipment to an "interbrand" competitor of Kodak's. These factors include: 1) the large capital expenditures in

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[3] When ITS entered into bidding head-to-head with Kodak for the State of California contracts for the Mental Health Department and for the Department of Transportation, the yearly maintenance costs for these Ektaprint machines were reduced to less than 1/3 of Kodak's EMA list price. Additionally, the State of California agencies experienced an improvement in service and the response time of service. ITS was cleared to bid on additional state contracts as a result of its quality service and price, and received additional contracts from the Department of Finance and Department of Health Services. (Dec. Hernandez, ¶¶ 20,24)

equipment; 2) the law residual equipment prices (fostered by Kodak); 3) the high cost associated with switching formats of microfilm and records (e.g. Miracode and Oracle microfilm); 4) the high cost of redoing applications software (e.g. CSC); 5) the difficulties created by Kodak in obtaining service and reconditioning for their used equipment; and, 6) the cost associated with new training of operators and adapting to a different brand.

A. <u>The Lock-In Of Kodak Micrographics Equipment Owners</u>.

In the area of micrographics, Kodak customers, whether employing older systems such as the Kodak Miracode or Oracle computer aided systems, or newer systems, cannot, as a matter of economic feasibility, readily "junk" their Kodak equipment because of supra-competitive prices in service. This is becoming increasingly so with newer, some sophisticated equipment because of the complexity of applications and the software which links various functions in the micrographics area.

In old systems, such as the Kodak Miracode, where there are large amounts of microfilm of old records, the systems must be maintained unless the cost is absolutely prohibitive, or all of the old microfilm (which is not frequently used) must be changed to new formats at substantial expense. (Dec. Kastner ¶ 6,; Dec. Welch ¶¶ 17-18)

The same is the case with the more recent Oracle terminal. Microfilm, which may, as in the case of Super Value Stores in Minnesota, contain several years of back

invoices, or as in the case of the Sacramento County Sheriff's office, contain warrants and arrest records for years, must, as a matter of economic feasibility, be serviced, or the owner spends tens of thousands of dollars to convert all of its records to a new machine. (Dec. Kastner ¶¶ 7,8; Dec. Hernandez ¶¶ 39, 40, 41, 42-47)

This "lock-in" is increased by a number of other factors as to old equipment. Because Kodak refuses to service very old equipment, there is often a very low residual value to the equipment. Recoupment of any portion of the high initial capital cost is difficult. Without ISO's, and no service at all from Kodak, the effect of the lock-in would be magnified. Because of the age and limited use of the records for a Miracode or Oracle system, payment by a consumer of large amounts to upgrade the records to newer equipment is less financially feasible. Where service is available on these machines, Kodak may require an EMA. Even if per call service were available, the customer must endure Kodak's "mandatory wait" of up to three days for per call service. (Dec. Welch ¶ 23; Dec. of Kastner ¶ 7)

As to newer equipment, such as that in the sophisticated application of CSC in Sacramento, California, the lock-in becomes even more pronounced. CSC has over 100 pieces of Kodak micrographics equipment. Its operations are similar to large Kodak micrographics systems in operation in Blue Cross/Blue Shield, insurance companies, banks, and other large financial institutions in many states.

The system at CSC includes a combination of micrographics machines, and of computer output hardware

and software tailored specifically to CSC's needs. Trading its entire equipment for an "interbrand" competitor of Kodak, due to supra-competitive prices, it would be financially unfeasible for CSC. The special software would have to be retailored at a cost of several hundred thousand dollars. Data would have to be reformatted, and operators would have to be retrained, again, at a cost of hundreds of thousands of dollars. Finally, because the residual value of CSC's Kodak equipment (which is still perfectly functional and well within its useful life) is so low on the used market, the net cost of purchasing new equipment less the residual value of CSC's existing equipment, would be in excess of $1.5 million. In short, CSC could, and *did*, pay supra-competitive prices of almost $100,000 more per year for service for this equipment, without considering changing to Kodak's alleged "interbrand" competitors. (Dec. Hernandez ¶ 50; Hennefer, Exhibit C)

B. The Lock In Of Kodak Ektaprint Photocopy Owners

Owners of Ektaprint photocopy machines are not subject to all of the complex forms of "lock in" that sophisticated micrographics systems such as CSC's involve, but some of the same factors apply. The useful life of Kodak Ektaprint photocopiers is generally regarded as 14 years (7 years automatic availability for an EMA, plus 7 years of an EMA with yearly inspections). The cost of a piece of Ektaprint photocopy equipment, however, is generally considerably more than most micrographics equipment. For example, a Kodak 150AF

copier (one of the cheaper models) costs approximately $75,000 new. In two to three years, or the expiration of 20% of its useful life, the value of the copier will have depreciated down to $2,500 to $3,500. (Dec. Hernandez ¶ 56; Dec. Arnold ¶¶ 6-7; Dec. Varing ¶¶ 16-17, 20)

A copy shop will have several of these $75,000+ machines. Even with supra-competitive prices for Kodak Ektaprint service that were $2,000-$3,000 or more above a competitive market level, it is economically totally unrealistic and unfeasible that a Kodak Ektaprint owner would avail themselves of Kodak's alleged "interbrand" switching with regard to that equipment. The owner is locked into the Kodak Ektaprint machines he owns. Kodak's own actions, in progressively restricting the availability of Kodak service and reconditioning for brokered machines, has greatly increased the effect of this "lock in" by depressing the price of used Kodak photocopy machines. Examples of this are the high "pre-installation inspection fees" (which bear no relationship to Kodak's costs), the stated Kodak policy and Kodak practice to make reconditioning as expensive as possible, and the "discretionary" ability to refuse to recondition and service used machines that are brokered.

C. Kodak's Depressing Of The Used Ektaprint Copier Market

The used Ektaprint copier market is a new phenomenon. Kodak has not changed the basic Ektaprint copy machine since the Ektaprint 150 came out in about 1976. (These can be remanufactured into the more sophisticated 200s, 225, 235s and 300s, which Kodak does). As a result a

substantial market has developed for reconditioning and brokering these machines, which market competes with Kodak's new machine sales.

Because of the lack of Ektaprint ISOs, Kodak service for these used machines is often essential to a sale. Without Kodak service, or, with unreasonable costs for such service, the brokerage and reconditioning market for Ektaprint machines is unviable. Kodak, first through its "pre-installation inspection fee," (which was first initiated in 1985 and then increased up to five fold in 1987) then by its stated policy and practice to charge as much as possible for reconditioning, then by its refusal of per call service, and finally, by its discretionary refusal to recondition or service at all (often *without regard for the condition of the equipment*), has made it extremely difficult to purchase and sell used Kodak Ektaprint copiers. As a result, the price of Kodak copiers on the used market has been drastically reduced, in some cases to one-quarter of its prior value. (Dec. Varing ¶¶ 16, 17; Dec. Arnold 8)

These restrictions were instituted by Kodak without regard to whether or not the Ektaprint photocopy machine was on a Kodak EMA (and presumably in top "Kodak" condition), but were based solely on whether the machine was brokered by a third party. Likewise, the useful life of a reconditioned machine, if sold by Kodak, was guaranteed by Kodak, whereas the *very same* reconditioned machine, if acquired by a broker from Kodak in exchange for a brokered machine, would have no guaranteed useful life. Kodak, to discourage further the ability to sell used machines through brokers, and to depress the price of the brokered equipment market, offered trade-ins many times the going market rate. These tremendous

restraints, purposefully imposed by Kodak, further served to "lock in" equipment owners who wished to deal with brands other than Kodak.

III. Kodak's Changes In Policies and Practices in 1985 and 1986.

A. Kodak's Micrographics Policy Changes

1. The April 12, 1985 Micrographics Policy Change.

Kodak had sold all micrographics parts to all servicers, including Kodak ISOs prior to 1985. In response to the growing Kodak micrographics ISO competition, Kodak initiated the policy set out in the April 12, 1985 memorandum of E.A. Gross and J.A. Lacy (Dec. Gross, Exhibit 1). Under this policy Kodak cut off parts on new products to Kodak micrographics ISOs. The effect of this, of course, was that as customers of Kodak micrographics ISOs obtained new equipment, the ISOs were unable to service the equipment for that customer, and, service for these customers was lost by the Kodak ISOs. Additionally, as equipment became obsolete, and the equipment population became all "new equipment" (post April 1985 models), Kodak micrographics ISOs would be able to service no equipment at all. (Dec. Damiani ¶¶ 23, 24; Dec. Welch ¶¶ 8,22; Dec. Kastner ¶ 8; Dec. Searle ¶¶ 4,12,13)

2. The July 1986 O'Brien Letter.

On July 15, 1986 (and on a continuous basis thereafter as new ISOs were identified) Kodak sent out to micrographics equipment competitors a letter from Joseph O'Brien, setting out its new policy for supply of Kodak

micrographics parts to Kodak micrographics service competitors. (Dec. Lorenson, Exhibit 1). The substance of the letter stated: 1) parts would only be sold to competitors who "previously and regularly" purchased parts for the same equipment model (although Kodak had no way of determining this); 2) that orders would not be filled from inventory but consolidated and would be subject to an "anticipated lead time" of "90 days or more"; 3) that parts purchased by Kodak on an "all time" order basis (parts which do not regularly wear out) would not be sold to competitors at all; 4) that no rush orders would be available to competitors; and 5) that the normal 10% discount for non-rush orders would not be available to competitors.

Kodak referred to its competitors as "outside entities who did not purchase equipment directly from Kodak" a term for which the Kodak acronym "BENU" (Business Equipment Non-User) was dubbed. Kodak documents equate BENU directly with service competitors. Kodak attempts to ferret out BENU's and to internally control the supply of parts to them included the formation of a "tiger team" to search out (and destroy) BENU's through Kodak's parts policy, and, the determination of critical operational parts and the delay or not selling of these to BENUs (Kodak Documents Nos. 81 and 82). Statements by Kodak's personnel, including the head of Kodak micrographics "BISD", John A. Lacy, indicate a clear intent to destroy Kodak's micrographics service competitors. (Kodak Documents Nos. 81, 82 and 834; Dec. Damiani ¶¶ 15,22; Dec. Hernandez ¶ 54).

Kodak, while identifying BENUs, and severely restricting or cutting off their parts, sold parts to others

across the country – so long as they were not identified as a Kodak service competitor ("BENU"). Parts were sold to: 1) self-servicers; 2) Kodak brokers; 3) service bureaus (who performed micrographic services for third parties – but who had never purchased micrographics equipment directly from Kodak); 4) to equipment users such a financial institutions (who had never purchased equipment from Kodak); and 5) to total strangers to Kodak with no association to micrographics machines at all (such as the "China Hutch," an English China Shop, or non-existent individuals such as "Remy Corgi," a person's dog). (Dec. Searle ¶¶ 10, 11; Dec. of Tamvacakis ¶ 9.5).

Parts orders, normally available to Kodak competitors on overnight or one day basis for "rush orders", and 14 days, for "non-rush" orders, were all delayed from an average of 30 to 50 days or longer. These delays had nothing to do with parts inventories, since time and again non-competitors of Kodak (who did not even own micrographics equipment), on precisely parallel orders (same part, same day, same geographical area) placed by plaintiffs through non-BENUs received overnight service on parts as to which plaintiffs were told Kodak was "back ordered" or "out of stock". (Dec. Searle ¶ 9.1; Dec. Tamvacakis ¶¶ 9.2, 9.3; Dec. Kastner ¶¶ 10, 11). Parts that were represented to Kodak ISO competitors as "all time" parts were also denied to plaintiffs but sold to total strangers to Kodak because they were not identified as Kodak service competitors (Dec. Tamvacakis ¶ 9.1).

As to the persons to whom Kodak sold parts, such parts were sold only so long as those parts were not resold to Kodak competitors. When it was discovered Butler Office Systems had purchased parts on behalf of

plaintiff Atlanta General, Butler's parts were cut-off. Parts continue to be sold to service bureaus, such as Dataplex, who also offer third party micrographics service, but as to whom Kodak had a substantial financial interest in selling supplies and equipment. Because of the implied threat of cut-off, such service bureaus will not, and do not openly sell parts to Kodak ISO competitors.

B. Changes In Kodak's Photocopy Practice

Kodak claims that, despite its "Terms of Sale" that committed it to selling *all* parts to "any party who intends to use them to repair Kodak equipment," it would not and did not ("knowingly") sell parts for its photocopy machines to Kodak Ektaprint service competitors. This is not true. Paul Hernandez at Image Technical Service inquired of Kodak's CESD and was told he could purchase parts for the repair of Kodak Ektaprint copiers, and did so. Only after ITS competed head-to-head with Kodak, and the competition began to impact Kodak, did Kodak attempt to institute a detailed plan to cut-off parts to photocopy service competitors. This occurred in June, 1985, immediately after ITS's successful bids on State of California Ektaprint service, and just before the July 1, 1985 beginning of those contracts with the State of California.

Kodak admits, and the documents show, that Kodak has continued to sell parts to "self servicers" of Kodak Ektaprint machines – those who service their own machines. Kodak's sale of such parts to, for example, the Top Copy in Boston, Massachusetts are expressly conditioned on their not reselling these parts to Kodak

Ektaprint ISO service competitors, or going into Kodak Ektaprint service themselves. (Dep. Gleason pp.71-76; Kodak Doc. No. 000002930). The touchstone of whether Kodak would sell parts was not whether the purchaser had equipment purchased from Kodak, but whether the parts were to be used by Kodak ISO service competitors. (Dec. Hernandez ¶¶ 25-27 and 59).

In addition, as to parts already in the marketplace, Kodak instituted a malicious campaign to prevent Kodak Ektaprint ISO service competitors and reconditioners from obtaining such parts. Detailed searches were made for how ITS was obtaining parts. Paul Hernandez, a former Kodak service representative with an excellent record and top technical skills, was accused of ordering and stealing parts prior to his departure from Kodak. People in the industry were told that Mr. Hernandez was buying "stolen" Kodak Ektaprint copy parts that had been stolen by other Kodak service representatives. The statements were not true. (Dec. Hernandez ¶ 59; Kodak Docs. 000002917-2920, 000003058.

Individuals from Kodak's "security" forces in Rochester were sent to a Chicago, Illinois leasing company, Capital Leasing, and without authority, and illegally, seized $25,000 worth of Kodak Ektaprint parts which they implied were "stolen" and stated the "FBI" would become involved. Kodak, although challenged, has not explained or justified its actions. (Dec. Varing ¶¶ 8-11; Dec. Hennefer ¶ 32). Additionally, the same individual from Kodak's Rochester "security" force came into the offices of CPO Limited, a Kodak Ektaprint service and used equipment competitor, demanding documents and records on a legitimately owned, brokered and

resold Kodak machine, implying it too was "stolen." Again, no justification, or court process was proffered by Kodak. (Dec. Arnold ¶ 18)

C. Kodak's Parts Suppliers Refuse to Deal with ISOs

As a result of Kodak's cut off parts, many ISOs attempted to purchase parts directly from Kodak's parts suppliers. On non-patented parts, almost across-the-board these parts suppliers refused to deal with ISOs, citing arrangements with Kodak. (Dec. Searle ¶¶ 15, 16; Dec. Welch ¶¶ 21, 22; Dec. Hernandez ¶ 60) Kodak was aware of such refusals. (Kodak Doc. No. 000002919)

D. Kodak Policies On Used Photocopy Equipment

Kodak initiated its campaign against third party service of Ektaprint copiers and brokered equipment with the cut-off of parts to ITS in June, 1985. On August 5, 1985, Kodak, in a memo from E. Ince and M. Murray of CESD and Kodak Copy Products noted its "interest" in the "appearance of third party service organizations" in connection with its interest in Ektaprint copiers "sold to its customers by equipment brokers or other third parties." (Dec. Murray, Exhibit 7).

While Kodak's "current" business practices as set out in the April 5, 1985 letter purported to limit Kodak's actions to: 1) assuring that servicing of third party Ektaprint copiers was limited to machines that were brought up to Kodak standards; and, 2) assuring that parts were available only to direct purchasers of Kodak

Ektaprint copiers from Kodak, the intent and practice were different.

The intent, as stated by Kodak service representatives, and Mitchell Bendar, of Copy Products, was to put third party brokers of Ektaprint copiers out of the Kodak business. The practice was to make it as difficult as possible for brokers and buyers of third party Ektaprint copiers (not sold directly by Kodak). A series of steps were implemented by Kodak to assure this. The initial "pre-installation inspection fee" for inspecting a machine and determining what was required to bring it up to standard, announced August 1985, was raised up to 500% in January 1987. The reconditioning centers, for bringing machines up to standard, which had been located around the United States, were closed down and centralized in Rochester, making transportation and reconditioning extremely difficult. (Dec. Varing ¶ 15). The useful life on the *same Kodak reconditioned machine* was guaranteed if the machine was purchased by Kodak, but not if that machine was traded by a third party broker for a brokered machine. (Dec. Arnold 19). Kodak technicians were instructed to make the preinstallation inspection and reconditioning as expensive as possible. Machines that had hitherto been put on Kodak's service because of high-quality reconditioning by third party brokers were refused for service on spurious grounds. (Dec. Arnold ¶¶ 16-18; Dec. Varing ¶¶ 18, 19) Kodak's district service representative admitted that there were "new pressures" being applied from Kodak in Rochester to make service difficult. (Dec. Arnold ¶¶ 9-10).

Kodak, as it tightened up on service availability for Ektaprint machines drove the price of these machines

down. Whereas a Kodak Ektaprint machine 150AF sold for approximately $12,000 before Kodak began its actions, its price had been reduced to approximately $2500 by 1987. (Dec. Arnold ¶¶ 6-7; Dec. Hernandez ¶¶ 5, 6). This drop in price made even the expenses associated with Kodak's campaign to maximize inspection/reconditioning/service expenses worthwhile to undertake by reconditioners. At this point, Kodak, on February 1, 1987, introduced a new condition that stated "remanufacturing for equipment not purchased directly from Kodak is available at the sole discretion of Kodak" and has used this term to refuse to recondition machines of active Kodak Ektaprint broker competitors. (Dec. Varing ¶ 18; Dec. Arnold, Exhibit C).

E. Changes of Kodak's Terms of Sale and Parts Principles

Kodak did not change its Replacement Parts Principles until December 2, 1985 to, in part, reflect its prior changes in practice. The "Replacement Parts Principles" eliminated the same statement on that date. Kodak again modified its terms of sale on December 1, 1986 to try to reflect its revised practices in cutting off parts to third party service competitors in the micrographics and photocopy area. (Dec. Hernandez Exhibits B and C)

The parts policies of Kodak's CESD Parts Services Division, contrary to Kodak's implications, had *always*, kept replacement parts stocks "maintained . . . at a level carefully planned to fulfill Kodak's commitments only for its dealers and distributors, users and CESD customers."

(Dec. Hernandez, Exhibit A) The new "business justifications" offered for the 1985 reduction of parts for third party servicers, to institute controls that had existed for years, does not conform with Kodak's longstanding "Replacement Parts Principles". Moreover, a simple review of Kodak's tremendous effort to attempt to ferret out its competitor BENUs, when Kodak admits that less than 5% of the specially processed parts orders were ever denied, was considerably more expense than any alleged savings from lower inventories. (Kodak Doc. 0000065)

F. Kodak Makes Substantial Profits on Parts

Kodak's further "business justification" that it was not making a reasonable return on assets, and that Kodak ISO's were "free-riding" is totally without factual support.

First, many ISO's have inventories of Kodak parts substantially greater than Kodak's. B.C.S. Technical Services, for example "turned" its parts inventory once every three years. Kodak's CESD Parts Services is able to turn its parts inventory every 60 days. (Dec. Welch ¶ 19). Other Kodak ISO's also stocked substantial parts for their service, and ordered parts well in advance. Kodak, moreover, manufactures approximately 10% of its own parts. It is merely a "broker" of these parts which it sells at a substantial mark-up. (Kodak Document Nos. 2375-2902; Dec. Welch ¶ 20; Dec. Kastner ¶ 13; Dec. Damiani ¶ 21). Kodak charges ISO competitors twice what it prices the same parts to its equipment service representatives for. This price to ISO's, as of September 1, 1986 was raised by an additional 10%. This mark-up on parts, where other

sources are available, shows that Kodak has almost twice the mark-up of other vendors for the same parts. (Dec. Kastner ¶ 13).

G. Kodak's Anti-Competitive Intent

Kodak has not only manifested an anti-competitive intent in its policies and actions but it has directly stated it. The statements of John A. Lacy to Paul Gilbertson of CSC indicate that Kodak's BISD could control ISOs since it "has them by the balls" because of the replacement parts. (Dec. Hernandez ¶ 54) The statements by the Copy Products manager Mitchell Bender that they would put the Kodak Ektaprint brokers out of the Kodak business, likewise manifests an anti-competitive intent. The creation of a "tiger team" clearly connotes predatory intent, and not a benign business interest in parts control. (Kodak Document Nos. 000081-82). The illegal confiscation of parts and pressuring of Ektaprint brokers and ISO's is without business justification and also demonstrates anti-competitive intent (Dec. Varing ¶¶ 8-11). The timing of the parts cut-off to ITS, just after its successful bid against Kodak for the State of California, is likewise anti-competitive. (Hernandez Dec. ¶¶ 19-23) Discussing losses to ISOs, one letter said "Parts availability for third party service is a step forward. We will need the ability to provide cost effective service as well" (Kodak Doc. 00003389).

H. The Effects of Kodak's Actions

The competitive effects of Kodak's actions are obvious. Kodak ISO's have been unable to expand, and

many have lost substantial accounts and revenues in the past one and one-half years. (Dec. Hernandez ¶¶ 28, 29; Dec. Searle ¶¶ 4, 12-13; Dec. Tamvacakis ¶ 16; Dec. Damiani ¶¶ 22-23). Customers who paid, and are paying supra-competitive prices do not have the option to bargain for lower prices and better quality service, such as CSC did with plaintiff ITS. (Dec. Hernandez ¶¶ 46, 48-50). ISOs, who once competed with Kodak, have gone out of business (Dec. Tamvacakis ¶ 15; Dec. Hernandez ¶ 35; Dec. Welch ¶ 5).

In the Kodak photocopier area, the market for used photocopiers has greatly diminished in number of machines, *and* in value. Owners, locked-in by the low residual values (which is not alleviated by Kodak's high trade-ins since they are then required to buy more Kodak machines) are not selling their machines, since these represent investments that, for example, cost $75,000 a few years ago and now have a value of $2500. (Dec. Varing ¶ 17; Dec. Hernandez ¶ 41; Dec. Arnold ¶ 7). The business of brokers in Ektaprint machines has been greatly reduced, and consumers desiring to purchase Kodak machines have less supply and, as a result of Kodak's inspection/reconditioning/service requirements, substantially higher costs. (Dec. Varing ¶¶ 12, 20; Dec. Hernandez ¶¶ 56-57; Dec. Arnold ¶ 23).

Unlike the market for service of IBM and Xerox photocopy machines, and that of Micron, Microdesign and Fuji for micrographics machines, the market for service of Kodak equipment is moving toward a total Kodak monopoly and supra-competitive prices again. The San Francisco Bay Area, where Kodak ISO service was alive, and as to which service the Kodak district manager said:

> "Kodak's price was twice that of ITS. Of course we lost the bid. To date they have received an average of two hour response time, no problems with parts, and overall are very satisfied with the quality of service they have received from ITS. (Kodak Document No. 00003082)

will soon not have these competitors. The severe detriment to consumers in the marketplace because of the loss of such service, in terms of price, quality and availability of the product at issue – Kodak micrographics and photocopy service – cannot be seriously refuted.

LEGAL ARGUMENT

I. Summary Judgment Is Not Appropriate Where There Is Conflicting Factual Evidence And Issues Of Motive And Intent Are Present

In *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), the Supreme Court cautioned against the improper use of summary judgment in complex antitrust cases, stating:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, and proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice." *Id.* at 473.

Summary judgment may be an appropriate method to test the validity of the underlying antitrust theory in certain cases, but only if, without controverting the validity of the plaintiff's factual contentions, the acts of defendant, as a matter of law, simply do not amount to an

antitrust violation. *See, Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977). This is not the case here.

The case of *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.* ___ U.S. ___, 106 S.Ct. 1348 (1986) has not changed this principle one iota, but has reinforced it. There, plaintiff's claim of predatory pricing was found, even if all the facts asserted were true, to be implausible and to make no economic sense. Here, it is Kodak's case, for "interbrand" competition, that makes no economic sense.

The Ninth Circuit reaffirmed the validity of *Poller* in *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1477 (9th Cir. 1986) (decided after *Matsushita*) and stated, citing *Poller*:

> Although summary judgment generally is disfavored in antitrust litigation, [citations omitted] it appropriately may be granted if the nonmoving party does not show any issues of material fact and does not present an adequate record to support a finding in his favor. *Filco v. Amana Refrigeration, Inc.* 709 F.2d 1257, 1260 (9th Cir.), *cert. denied*, 464 U.S. 956, 104 S.Ct. 385, 78 L.Ed.2d 331 (1983).

Where, as here, valid antitrust theories are alleged, and there is evidence of anticompetitive intent and anticompetitive effect, which evidence is claimed by defendant to be insufficient as a matter of law, summary judgment should be sparingly granted. *See, e.g., Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Impro Prods, Inc. v. Herrick*, 715 F.2d 1267 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 1282 (1984); *Battle v. Lubrizol Corp.*, 513 F.Supp. 995 (E.D. Mo 1981), *aff'd by equally divided court*

(en banc), 712 F.2d 1238 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___ (1984).

In the present motion for summary judgment Kodak has attacked plaintiffs' case on two major fronts: 1) product market definition; and, 2) injury to the "interbrand" market. Kodak has, however, as to the Kodak service market, and as to the existence and effects of the "lock-in" of Kodak machine owners, presented no credible factual materials supporting its position and attacking plaintiffs' position. Plaintiffs really need not even present evidence on these issues. *Aickes v. Kress & Co.*, 398 U.S. 144, 160 (1969); *Dalke v. Upjohn Co.*, 555 F.2d 245, 248 (9th Cir. 1977), *White v. Thomas*, 660 F.2d 680, 682-683 (5th Cir. 1981).[4]

II. The Kodak Service Markets Are Relevant Product Markets

In a Section 2 monopolization case, relevant product[5] market is determined by the reasonable

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[4] *see* Advisory Committee Note to Fed.R.Civ.P. 56 ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment may be denied even if no opposing evidentiary material is presented."). Plaintiffs, nevertheless have presented extensive evidence establishing the product market, and the "lock-in" of Kodak machine owners, which creates genuine issues of material fact.

[5] "Product" means product or service. 1984 U.S. Department of Justice Merger Guidelines, Dec. Hennefer, Exhibit A, section 2.0; *see United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (making clear that relevant product market test applies

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interchangeability of products in meeting a consumer need. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956). Reasonable interchangeability may occur because several different products are reasonable substitutes for the same use ("demand side substitutability") or because suppliers of different products can and will readily begin to produce the product necessary for the use (supply side substitutability"). See *duPont, id.; see also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

Two products are determined to be within the same market if their prices are responsive to each other. If the prices of the products move together, it demonstrates a low cross-elasticity and high degree of competitiveness. *duPont* at 400. In addition to examining relative price patterns, courts examine certain "practical indicia" in defining the appropriate product market. *Brown Shoe*, 370 U.S. at 325.[6] These "practical indicia" include:

> [I]ndustry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and usage, unique production facilities, distinct customer, distinct prices, sensitivity to price changes, and specialized vendors.

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to market for service); *C.E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1244 note 1, (5th Cir. 1985) (Section 2's proscriptions apply with equal force to both service and product markets.").

[6] *Brown Shoe* involved examination of a proposed merger under Section 7 of the Clayton Act. The *Brown Shoe* test for defining markets was adopted for monopolization cases in *Grinnell. See also C.E. Services v. Control Data Corp.*, 759 F.2d 1241, 1246 (5th Cir. 1985).

Id.; see also Department of Justice Guidelines at section 2.12.

In this motion, the issue is whether there can be relevant markets or submarkets for the products that are the subject of this litigation. These products are: 1) service of Kodak micrographics machines; and 2) service of Kodak Ektaprint copiers. To resolve this issue, the relevant market test developed and synthesized by *duPont, Brown Shoe* and *Grinnell* must be applied to the proposed markets – that is, the markets for service and repair of Kodak micrographics machines and Ektaprint copiers.

Kodak's premise is that if there exist markets for micrographics and copier machines in which Kodak is a player, there cannot co-exist markets or submarkets for the service and repair of Kodak micrographics machines and copiers as a matter of law. This premise is incorrect. Trusting to this incorrect premise, Kodak has not even attempted to analyze the competitive circumstances of the products at issue in this litigation – service of Kodak micrographics and copy machines – and has not applied the *duPont/Brown Shoe/ Grinnell* test to define the market in which this product is traded.

A. The Market for Service and Repair of Kodak Hardware System Can Exist as a Matter of Law

Kodak cites five cases in an effort to convince this Court that precedent precludes finding a relevant market for service and repair of Kodak micrographics machines and photocopiers. (Kodak brief at pp. 32-34) The proper delineation of the relevant market is a question of fact

that must be determined upon examination of the particular facts in each case. *DuPont*, 351 U.S. at 395, note 22.

Kodak's position in this motion is similar to the defendants' position in *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977). In *Heatransfer Corp.*, the defendants lost on the relevant market issue. The Fifth Circuit found that the relevant product market could be confined to the sale of air conditioners for use in Volkswagen, Audi and Porsche automobiles. 553 F. 2d at 981 ("[W]e cannot find, as a matter of law," that the jury's finding that the market consisted of the sale of air conditioners for use in VWoA imported automobiles was incorrect.") The *Heatransfer* Court found unpersuasive the defendants' argument that relevant product market cannot be limited to one product. Instead, the court applied the tests enunciated in *duPont* and *Brown Shoe*.

In each of the cases cited by Kodak, relevant product market was determined by examining the particular facts of the case. This is necessary because of the "ad hoc, fact-specific core embedded in any determination of relevant market." *C.E. Services*, 759 F.2d at 1245, citing *Heatransfer*, 553 F.2d at 979; see also *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 812 F.2d 1160, 1171 (9th Cir. 1987) (District Court erred in deciding relevant market issue as a matter of law because market determination is a question of fact.)

Kodak relies primarily upon *General Business Systems v. North American Philips Corp.*, 699 F.2 965 (9th Cir. 1983) where plaintiff proposed a product market for the sale of magnetic ledger cards used to operate one brand of computers. The magnetic ledger cards are an integral part of

the computer and the computer cannot work without them. The court thus found there was no separate market for metal ledger cards, and the appropriate product market was the market for small business computers.

General Business Systems was properly distinguished from *Heatransfer* in the case of *Slocomb Industries, Inc., v. Chelsea Industries, Inc.*, 1984 – 1 Trade Cases (CCH) para. 65, 932 (E.D. Pa. 1984). The court in *Slocomb* noted that the metal ledger cards in *General Business Systems* were integal parts of the small business computers in which they were contained, that the small business computers could not be run without these parts, and that the two were naturally sold together. In contrast, the air-conditioning units in *Heatransfer* were not integral to the automobiles in which they were placed. The court stated:

> Consequently, there is no interchangeability where the final product is useless without its component parts, as here and in *General Business Systems*, but contrary to *Heatransfer Corp.*

Slocomb at 68,028.

Applying this distinction to the Kodak micrographics and photocopy service industry, it is obvious there can be a separate market for service of Kodak micrographics machines and Kodak photocopy machines. Service is not a "component part" without which a micrographics or photocopy machine cannot operate when sold. Micrographics and photocopy machines and service are not normally sold together. This is the case of most manufacturers who allow independent service for their micrographics and photocopy machines. In such cases they are *always* sold separately. This is true for micrographics

machines for such brands as Micron, Microdesign, Information Design, Alos, and Fiji (Dec. Hernandez ¶ 55). This is also true for photocopy machines for such brands as IBM and Xerox (Dec. Varing ¶ 21).

Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (5th Cir. 1978), cited by Kodak at pages 27 and 33 of its brief, is one of the few existing cases dealing with service of equipment cited by Kodak.[7] In *Spectrofuge*, the court characterized the definition of the relevant market as "essentially a matter of resolving factual issues." 575 F.2d at 276. *Spectrofuge* is thus, by its own terms, a case involving a failure of proof on a factual issue.

In *Kaplan v. Burroughs Corp.*, 511 F.2d 286 (9th Cir. 1979), also cited by Kodak, the Ninth Circuit repeated the admonition that the relevant market is fact specific.[8]

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[7] Kodak also cites *Dimidowich v. Bell & Howell*, but only to incorrectly state that it does not apply. Additionally, Kodak cites *Bushie v. Stenocord Corp.*, 460 F.2 116 (9th Cir. 1972) which involved the sale and service of office dictating machines. As the facts of this case demonstrate, this activity bears little, if any, relationship to the business of servicing the micrographics systems such as that at CSC, or large and expensive Kodak Ektaprint copier-duplicators.

[8] "The *Brown Shoe* indicia are not to be used in a 'talismanic fashion' whereby their presence or absence are regarded as mechanically dispositive of the issue." *Id.* at 292; "*Brown Shoe* compels us to examine a variety of factors in defining relevant submarkets" *Id.* at 294. The "indicia"

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Certainly, in the case at bar, for an owner of many pieces of expensive Kodak micrographic equipment or photocopy equipment, changing brands of such micrographics systems or large copier-duplicators because of supra-competitive service prices (which are at most a few percent per year of the cost of switching to an alternative brand) is not "reasonably available." It makes no economic sense.

Courts have held that discrete markets for service of a particular product exist. In the case most directly on point, *C.E. Services v. Control Data Corp.*, the Fifth Circuit

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discussed by the Ninth Circuit in *Kaplan* included: "the availability of alternative commodities for buyers" (citing *Fount-Wip, Inc. v. Reddi Whip*, 568 F.2 1296, 1301 (9th Cir. 1978), and "alternatives reasonably available to the consumer." *Id.* at 292.

In *Kaplan*, the plaintiff's case depended on a market definition of only batch processors in the San Francisco area using Burroughs equipment at the time of the alleged antitrust violation. This the court rejected, in dismissing Kaplan's claim that his potential "Burroughs users" customers were restrained, since Kaplan's potential data process customers included "a very wide spectrum of businesses (which) were capable of using electronic data processing at the time." *Id.* at 295. The "reasonably available" potential customers of Kodak service ISOs clearly do not include persons who do not own Kodak micrographics or photocopy equipment. The specific facts of *Kaplan* have no relevance to the market determination here.

found there was a separate market for the service and repair of IBM 360 and 370 systems.[9]

By recognizing the existence of such a service, *C.E. Services* decisively rebuts Kodak's contention that it is impossible as a matter of law for there to exist a relevant market for the service and repair of a single manufacturer's equipment.

Further supporting Plaintiff's contention is the Ninth Circuit's recent decision in *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986). The "product" involved in *Dimidowich* was service of Bell & Howell equipment. The defendant Bell & Howell competed with plaintiff for the service of the equipment it manufactured and sold. The *Dimidowich* court used the concept of distinct product and service markets in analyzing the harm to competition resulting from the defendant's acts (803 F.2d at 1484) – an issue currently before this Court. The *Dimidowich* court stated:

> [A jury] would be entitled to infer from the behavior of the conspirators that the agreement was designed solely to discourage or eliminate significant competitors *in the service market*, rather than to compete more effectually in the product market.
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> . . .

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[9] In *C.E. Services*, the plaintiff and defendant agreed that the product market was the market for service of IBM 360 and 370 systems. The dispute between the parties was whether IBM participated in the relevant market. The Court found that this was a disputed factual issue that could not be decided on summary judgment.

> More importantly, the alleged agreement clearly has an anticompetitive effect *on the market for service of B&H equipment*.

Id. [emphasis added].

The many cases cited by Kodak are necessarily restricted as fact-specific holdings based on the particular circumstances of each case. The cases that most resemble the present matter, *Dimidowich* and *C.E. Services* actually *support* a finding of a severable service market and, more particularly, a discrete market for the service and repair of Kodak micrographics and photocopy equipment.

Kodak cannot prevail on its argument that it is impossible for such a market to exist as a matter of law. The facts of this case further demonstrates that Kodak cannot prevail at all.

B. Industry Facts Demonstrate That There Is A Market For The Service And Repair Of Kodak Equipment

The products at issue in this case are the service and repair of Kodak micrographics and the service and repair of Kodak photocopy equipment. Examination of the markets in which the products at issue are traded demonstrates that there is a separate market for each of these products based upon the tests enunciated in *duPont, Brown Shoe, Grinnell* and the Department of Justice ("DOJ") Merger Guidelines.[10]

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[10] Although the DOJ Guidelines are intended to apply to mergers, the relevant market concept in such an evaluation is the same as in a Section 2 monopolization case. *See* footnote 4, *supra*.

The basic measure in market definition is the cross-elasticity of demand and of supply between the product in issue and potential substitutes. *duPont*, 351 U.S. at 395, 400; *Brown Shoe* at 325; *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 111-113 (1984). A high cross-elasticity of demand (or supply) between a product and a potential substitute implies that a price increase in the subject product would be accompanied by a large increase in demand for (or supply of) the substitute product and therefore the substitute product would be in the same market. *duPont*, 351 U.S. at 400.

The DOJ Merger Guidelines attempt to quantify this concept by postulating, on the demand side, a 5% increase in the price of the product at issue, and assigning a test period of one year. DOJ Guidelines at Section 2.11.[11] The tests enunciated in the DOJ Guidelines provide an economically sound methodology for determining relevant market.

The cross-elasticities of demand and supply between the service of Kodak micrographics and photocopy machines and alternative products and services are high only for existing suppliers of service for Kodak micrographics and photocopy machines. The evidence shows that in the micrographic area, Kodak was able to sustain a

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[11] If the 5% price increase can be sustained for the one year period, then a market limited to the particular product at issue is not too narrowly defined. *Id.* To test cross-elasticity of supply, the DOJ Guidelines ask how many firms would switch to producing the product in question within one year of a 5% increase in the price of the product. DOJ Guidelines at Section 2.21.

substantial supra-competitive price of 50% to 100% for years with many customers without them switching to "interbrand" competitors. It shows that for a long period of supra-competitive prices, no Kodak service organizations develop in competition to Kodak. (Dec. Hernandez ¶ 11; Dec. Damiani ¶ 11; Dec. Kastner ¶¶ 6-8) Consequently the relevant product market should be limited to service of Kodak micrographics and photocopy machines.

1. Demand Substitution

Demand substitution describes the consumer's movement to alternative products or services in response to a price increase for the product that is the subject of the litigation. If the degree of substitution is high between a potential substitute product and the subject product, the substitute product is considered to be within the relevant market. Kodak argues that Kodak equipment users could switch to other information systems as a substitute product. Cast in the most favorable light, Kodak's argument is that information system users are concerned only with the "total cost of ownership" of a piece of equipment including the costs of the equipment, software (where used) and service that go into the system during the entire life cycle of the system. This argument does not dispose of the issue before this Court, which is the degree to which Kodak equipment owners *will* switch to other brands in response to a price increase in Kodak service.

The evidence presented by plaintiffs shows that this does not occur. The primary reason for this lack of substitutability is that a very substantial number of Kodak equipment owners are "locked in" to their Kodak systems

or equipment. The costs of switching from one brand of system or equipment to another brand are extremely high. These costs include: 1) the purchase of the new equipment; 2) the loss of value in the old equipment; and 3) investment in new peripheral equipment compatible with the new equipment. The user, increasingly must also develop new software. The user must often also adapt his data to the new equipment. The user must train his personnel to use the equipment system and the new software. A new service contractor must be obtained.

The total cost of switching to another brand of equipment from a Kodak system for a large user like CSC would cost at lease several hundred thousand dollars and could cost over $2,000,000. A 5% increase in the price of maintenance of the Kodak system would not precipitate the drastic remedy of substitution of another brand system for "locked-in" Kodak customers — i.e., Kodak equipment *owners*.

This was exactly the case in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984) where the customers were considered "lock-in" customers, and provided the primary basis of defendant's power to coerce, 734 F. 2d at 1343.

There are additional reasons why Kodak equipment owners will not switch to another brand in response to a price increase for Kodak service. For example, consumers do not have a perfect ability to compare equipment costs on the basis of lifetime present value. (Dec. Hernandez ¶ 61) In addition to imperfect abilities to evaluate total costs, consumers may have good reasons to compare

capital costs and maintenance costs on a different basis. For example, government users may purchase systems out of a different budget than the budget out of which maintenance is purchased. (Dec. Hernandez ¶ 62)

Another good reason why increased maintenance costs would not precipitate a change in systems is that the Kodak equipment user would have to give up the functionality and features unique to the Kodak machine which provided the original reason for choosing the Kodak equipment.

In any event, Kodak clearly cannot pass the quantitative aspect of the DOJ substitution test with its theory that Kodak owners would substitute other brand systems in response to a price increase for Kodak service. Any substitution whatsoever is not sufficient to demonstrate the invalidity of the market service of Kodak equipment. Such substitution must be sufficient to prevent a 5% price increase within the period of one year. DOJ Guidelines at Section 2.11. Kodak has not provided a quantitative analysis at all. Plaintiffs have shown specific facts that Kodak customers have, and do, retain Kodak equipment despite supra-competitive prices. "Locked-in" owners are simply not going to exchange their Kodak machines within a year for other brands of machines in response to a 5% increase in the price of service.

2. Supply Substitution

Product market definition requires examination of the likelihood that alternative services suppliers may begin to offer service of Kodak equipment. *Brown Shoe,*

370 U.S. 294 at 325; DOJ Guidelines at Section 2.21. This phenomenon is referred to as "substitution in supply."

Kodak's own policies, which prevent all parts purchases, preclude supply substitution. Kodak itself has made the acquisition of parts impossible for any new entrant into the Kodak service market. Its stated policy is not to sell parts for Kodak micrographics equipment to any company which has not "previously and regularly purchased parts for the same equipment model" (Declaration Lorenson, Exhibit 1). Its stated policy is not to sell parts for photocopy equipment to independent Kodak servicers *at all*. The unavailability of parts means that an increase in the price for Kodak service would not induce a supply response from the providers of service for other brands of micrographics or photocopy equipment at all.

3. "Practical Indicia"

In addition to examining cross-elasticities of supply and demand, the courts look at certain "practical indicia" in determining relevant product market or submarket. These include:

> industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and usage, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

Brown Shoe, 370 U.S. 294, 325; see also *C.E. Services v. Control Data Corp.*, 759 F.2d 1241, 1246 quoting *Brown Shoe*. Under each of the "practical indicia" listed in *Brown*

Shoe, the markets for service of Kodak equipment qualify as relevant markets or submarkets for antitrust purposes.

The manufacturers themselves consider service to be a distinct market from equipment. Kodak has a separate division for service, "CESD." This division has separate profit accountability and return on assets.

The service of Kodak equipment requires specialized knowledge and distinct parts. (Dec. Hernandez ¶¶ 6-8). Kodak parts are unique, and there is little or no interchangability between Kodak parts and parts for other micrographics or photocopy equipment (Dec. Hernandez ¶¶10, 13).

Kodak equipment owners constitute "distinct customers" for Kodak service. The uniqueness of Kodak equipment training required to service Kodak equipment is also a characteristic that makes the product – Kodak equipment service – unique. Furthermore, the customers of Kodak service need not be the same customers who contracted for the purchase of the Kodak equipment in the first place, but may be purchasers of used equipment. The prices for service of Kodak equipment do not follow the prices for service of other micrographics or photocopy equipment, nor do they follow the prices for purchases of equipment.

Kodak's legal definition of a product market is based upon the concept that the product market in an antitrust case is defined by everything that a defendant does. There is a different product market depending upon who is being sued. This construct flies in the face of the obvious fact that Kodak competes head to head with

Plaintiffs for service contracts. (Dec. Damiani ¶¶ 5,6; Dec. Arnold ¶ 5; Dec. Anderson ¶ 5).

The purpose of market definition is to aid in determining the effects of actions on customers by identifying the affected products and services and by determining whether demand and supply substitution are sufficient to eliminate those effects. *ILC Peripherals v. International Business Machines*, 458 F. Supp. 423, 428 (N.D. Cal. 1978). Market definition proceeds by identifying the product at issue in a particular case and by investigating the probabilities and extent of substitution in demand and supply for that product. *DuPont*, 351 U.S. 377 at 395; DOJ Guidelines Sections 2.11, 2.12, 2.21. The relevant market is a neutral concept and does not vary depending upon who is being sued. *DuPont* at 395-396 (relevant market is determined by examining substitutability for commodity in issue).

Kodak has not investigated this industry and has not provided the Court with information on how servicers of Kodak equipment operate or how consumers of Kodak service behave.

II. Injury To The Market

Injury to the relevant market is demonstrated by detriment to consumers in the market in terms of price, quality and availability of the product at issue. *Aspen Skiing Company v. Aspen Highlands Skiing*, 472 U.S. 585, 105 S.Ct. 2847, 2859 (1985); *R.C. Geothermal Corp. v. Thermal Genetics, Inc.*, 812 F.2d 1160, 1166-1167 (9th Cir. 1987); *Dimodovich v. Bell & Howell*, 803 F.2d 1473, 1484 (9th Cir.

1986); *Ralph C. Wilson Industries v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1364 (9th Cir. 1986) *aff'g* 598 F. Supp. 694, 704 (N.D. Cal. 1984).

Kodak's argument that there is no harm to competition is based upon its incorrect definition of the relevant markets. Kodak argues that there is no damage to "intense interbrand equipment competition" (Brief p. 21). The facts make it clear however that there are substantial competitive effects and injury both to plaintiff ISOs, and to consumers of Kodak micrographic equipment service and Kodak Ektaprint copy service. Plaintiffs have lost existing customers (Dec. Tamvacakis ¶ 16; Dec. Searle ¶ 12; Dec. Anderson ¶ 11; Dec. Damiani ¶¶ 22-23). Kodak service providers have gone out of business as a result of Kodak's actions (Dec. Tamvacakis ¶ 15; Dec. Hernandez ¶ 35; Dec. Welch ¶ 5). The expansion and future business of plaintiff Kodak ISO's has been lost (Dec. Searle ¶¶ 4, 13; Dec. Varing ¶ 20; Dec. Damiani ¶ 4; Dec. Welch ¶ 8). As a result, consumers of Kodak service have lost availability of the product at issue, under the *Aspen* standard.

Consumers have also lost substantial price advantages under the *Aspen* standard. Kodak's own personnel admit to 50% lower prices by ITS (Kodak Document No. 00003082). Many other examples of substantial price differences, often of 50%, which would be available to customers if existing ISOs are not driven out of business and are able to expand. (Dec. Hernandez ¶¶ 30, 50; Dec. Damiani ¶ 5; Dec. Kastner ¶ 7).

Finally, under *Aspen*, the consumers of Kodak service will lose the higher quality Kodak micrographic and photocopy service they have received. (Dec. Hernandez

¶¶ 12, 34; Dec. Damiani ¶¶ 5, 6 and 11; Dec. Searle ¶ 14; Kodak Document No. 00003082).

III. TYING CLAIMS

Section 1 of the Sherman Act 15 U.S.C.A. 81 (1982) ("Section 1") and Section 3 of the Clayton Act 15 U.S.C.A. §14 (1982) ("Section 3") both make tying arrangements unlawful. Illegal tying arrangements may receive a rule of reason analysis under Section 1, *Fortner Enterprises, Inc. v. United States Steel Corp., (Fortner I)* 394 U.S. 495, 500, 89 S.Ct. 1252, 1257 (1959), *United States Steel Corp. v. Fortner Enterprises (Fortner II)* 429 U.S. 610, 612 n.1, 97 S.Ct. 861, 863 n.1 (1977), *Phonetele, Inc. v. American Telephone & Telegraph Co.*, 664 F.2d 716, 738 (9th Cir. 1981), *cert. denied* 459 U.S. 1145, 103 S.Ct. 785 (1983). Tying arrangements are usually challenged under the test of presumptive illegality under Section 1 and Section 3. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551 (1984), (Section 1), *International Business Machines Corp. v. United States*, 298 U.S. 131, 56 S.Ct. 701 (1936) (Section 3), *Hirsch v. Martindale – Hubbell*, 647 F.2d 1343, 1346-47, *cert. denied*, 459 U.S. 973, 103 S.Ct. 305 (1982) (Sections 1 and 3). Plaintiffs herein allege, and the facts show, that Kodak has tied to its replacement parts: 1) Kodak service and 2) the purchase of new machines directly from Kodak. In doing so Kodak has engaged in *per se* violations of Section 1.

The Supreme Court has established that a plaintiff must prove four elements to receive the benefit of the *per se* presumption. The standard of proof requires that the

plaintiff show: 1) the tying and tied item constitute separate and distinct products, 2) the availability of the tying item has been conditioned upon the purchase of the tied item, 3) the party imposing the tie has sufficient economic power in the tying product market to appreciably restrain free competition in the tied product market, and 4) a not insubstantial amount of commerce in the tied item is affected by the arrangement. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6, 78. S.Ct. 514 (1958), *Fortner I, supra* at 499, *Fortner II supra* at 617-19, *Hirsh, supra* at 1346-47. However, even if the plaintiff proves these four elements the defendant may still escape liability by proving overall competitive reasonableness. *See e.g. Susser v. Carvel Corp.*, 332 F.2d 505, 520 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125, 85 S.Ct. 1364 (1965). Consequently, even though courts often state that tying is subject to per se illegality, the test really creates only a presumption of illegality.

The Ninth Circuit sometimes combines the first two elements of the tying test and states that the plaintiff must prove three elements to receive per se treatment. *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1338 (9th Cir. 1984), *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1479 (9th Cir. 1983), *California Glazed Computer Products v. Burns & Russell Co.*, 708 F.2d 1423, 1427 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 348 (1983), *General Business systems v. North American Philips Corp.*, 699 F.2d 965, 977 (9th Cir. 1983). The Ninth Circuit has also established two additional elements involved in a tying claim.

> The court must ask whether the seller of the tying product has an "economic interest" in the tied product, and whether a modicum of coercion was exerted by the seller of the tying item.

Elaine Powers, supra at 1479, *Moore v. Jas. H. Matthews & Co.*, (Moore II) 550 F.2d 1207, 1216 (9th Cir. 1977), *See also Jefferson Parish, supra* at 1559 (element of forcing justifies per se condemnation).

In *Foremost Pro Color Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 541 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1315 (1984), the Ninth Circuit stated the rationale behind the per se test.

> The principal evil of the tying arrangement, that which has traditionally justified its inclusion in the **per se** category, is that it denies competitors access to the market for the tied product not because the party imposing the arrangement necessarily has a superior product in that market, but rather because of the leverage exerted as a result of its economic power in the market for the tying product and the demand for the tying product.

This is precisely the situation in the case at bar. Kodak's service was totally inferior from a price standpoint – often 50% inferior – yet because of its control over parts Kodak was able to control locked-in customers and sell its service over that of ISOs.

A. Separate Products

The first question in a tying case is whether two separate products exist. For example, in *Jefferson Parish, supra* at 1561 the issue was whether the anesthesiology services constituted a separate product.

> The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations . . . the package includes the services of the anesthesiologist. Petitioners argue that the package does not involve a tying arrangement at all that they are merely providing a *functionally integrated package of services*. . . . Our cases indicate, however, that the answer to the question whether one or two products involved *turns not on the functional relation between them, but rather on the character the two items*. (Emphasis supplied).

The two products must be "distinguishable in the eyes of the buyers" *Id.* at 1562. *See also Fortner I, supra* at 89 S.Ct. at 1260-61 (footnote omitted). Service of micrographics and photocopy machines, both in Kodak machines, and, especially in Xerox, IBM, Minolta, Canon, Fuji and other machines where there are ISO competitors, is clearly distinguished by buyers as a separate product.[12]

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[12] The Ninth Circuit has also stressed that the plaintiff must prove two separate products exist. In *Moore, supra* at 1212 the plaintiff argued that the defendant tied the purchase of a cemetery lot to the purchase of a cemetery marker and that the defendant tied the purchase of a cemetery lot to the purchase and use of the cemetery installation service. The court stated:

> (i)n this circuit we have looked carefully at the "function of the aggregation" to determine whether only a single product is sold. . . . unless there are such considerations as legitimate cost savings or product used as a unit with fixed proportions, the tied product is generally regarded as "generically" distinct.

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2. Availability of Tying Item Conditioned

A tying arrangement is an agreement by a party to sell only one product on the condition that the buyer also purchase a different or "tied" product. *Foremost, supra* at 540. It requires proof that the buyer be forced to purchase a product he did not want. *Roberts Waikiki U-Drive, Inc. v. Budget Rent A Car System, Inc.*, 732 F.2d 1403, 1407 (9th Cir. 1984).

Here, Kodak has an express, written policy that they will not sell parts (with the de minimus self-servicers

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Moore, supra at 1215. *See also Fortner I, supra* at 1255-56. (Sale of prefabricated homes and credit arrangement financing those homes are separate products. Plaintiff sued under Sections 1 and 3 but court used the same analysis and discussed the causes of action together.) *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567, 81 S.Ct. 755 (1961). (Complex cable antenna system with various component parts sold on system basis only. Held component parts and installation separate products.)

Digidyne, also supports Plaintiff's argument that the service of Kodak micrographic and photocopy machines are separate products not a mere integral component of the machines and the replacements parts for those machines. In *Digidyne, supra* at 1338-39, the defendant refused to license its RDO operating system to anyone who did not also purchase its NOVA CPU software instruction set, which was designed to perform a group of tasks. Although the court ultimately found no illegal tying arrangement, the Ninth Circuit agreed that the "district court properly granted summary judgment on the first . . . of the required elements of a **per se** violation . . . on the undisputed facts the NOVA instruction set CPU and defendant's RDOs are separate products . . . ." The practical realities of the micrographics and photocopy industry indicate that the service of machines and replacement parts for machines constitute separate products.

exception) except to persons who purchase Kodak service. Kodak also has an express written policy that they will sell parts for self service only if the buyer first buys a machine from Kodak. This is sufficient conditioning. See *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 593 F. Supp. 1506, 1517 (N.D. Cal. 1984) (tying language alone is sufficient, despite evidence that it was not enforced).

It is clear from the declarations and Kodak's documents that Kodak intended to, and did in fact coerce parties to accept its service because parts were unavailable otherwise, and that Kodak repeatedly refused sales of parts to buyers and prospective buyers of third-party equipment in order to coerce them to purchase machines directly from Kodak.

3. Sufficient Economic Power in the Tying Market to Appreciably Restrain Free Competition in the Tied Market

In proving the third element of the tying claim, the plaintiff is:

> not required to prove a monopoly or dominant economic power, although proof that the seller occupies a dominant economic position in the market for the typing (sic) item satisfies this test. (Citations Omitted)

Moore II, supra at 1215. *See also Digidyne, supra* at 1339-40 (proof of power to fix the "price of the tying product in the whole of the relevant market" not required. "Possession by the seller of such monopoly power is sufficient to establish **per se** illegality, but it is not required.")

As the Supreme Court explained in *Fortner I, supra* at 1258-59

> the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market . . . . Accordingly, the proper focus of concern is whether the seller has the power to raise prices or impose some other burdensome terms such as a tie-in with respect to any appreciable number of buyers in the market.[13]

Furthermore, market dominance is not the only test for determining whether the seller possessed the requisite economic power. As the Supreme Court stated in *United States v. Loew's, Inc.*, 371 U.S. 38, 45, 83 S.Ct. 97, 1012 (1962) (quoted with approval in *Digidyne, supra* at 1340)

> Market dominance – some power to control price and exclude competition – is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from its uniqueness in its attributes.

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[13] *See also, Fortner II supra* at 867 ("power within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.") *Jefferson Parish, supra* at 1559 n.20 (power over whole market not required in a per se claim, Court requires "type of market power (that) has sometimes been referred to as leverage . . . loosely defined . . . as a supplier's ability to induce his customer for one product to buy a second product from him that would not otherwise by purchased solely on the merit of the second product.")

Kodak's market position in replacement parts satisfies this test. It has market dominance, controlling almost 100% of the market. Its prices are above that which would reasonably be charged, and *are* charged by other vendors, where such parts are available. It has the power to, and has shown the intent to exclude competition. It also has substantial product desirability, since these parts are an absolute prerequisite to servicing Kodak machines.

> In *Moore II, supra* at 1216 the Ninth Circuit stated
>
> other possible indices of sufficient economic power include: a competitor's inability to offer equivalent products or services profitably, a noncompetitive higher price charged for the tied product or the existence of a substantial number of buyers accepting the tie-in tems. (Citations Omitted)

Both the elements of a "noncompetitive higher price charged for the tied product" – Kodak's overpriced service – and "the existence of a substantial number of buyers" – over 95% of the photocopy service market and over 80% of the micrographics service market – are present here. Plaintiffs can easily prove the third element of their per se tying claim by showing that Kodak imposed burdensome terms in its sale of service and implemented coercive tactics in controlling service in tying them the purchase of Kodak parts, with respect to an appreciable number of buyers. *See Digidyne, supra* at 1340.

D. Not Insubstantial Amount of Interstate Commerce Affected in the Tied Market

The final element to show a tying violation is that a not insubstantial amount of commerce is affected by the

tying arrangement. Not insubstantial means not de minimus. *Moore II, supra* at 1216.

> The amount of commerce affected is not measured by the size or scope of any market foreclosed by the tie . . . the controlling consideration is "whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely **de minimus** is foreclosed by competitors. *Id.*

In *Moore* the court stated that the test has been met by showing dollar volumes and estimated sales. Plaintiffs' declarations satisfy this requirement.

Two other elements having been mentioned by the Ninth Circuit as involved in a tying claim. These are discussed below.

E. Economic Interest in the Tied Product

In *Moore II, supra* at 1216 the Ninth Circuit stated that

> in examining a tie-in claim, several additional questions must be answered. The first determination is whether the seller of the tying product has an economic interest in the tied product. Clearly by conditioning the sale of cemetary lots on the buyer's use of the cemetary's installation and care service or purchase of a marker from the cemetary, the test is met. Those cemetaries adopting a purchase requirement "through" the cemetary also have the requisite economic interest because they received a commission or profit on monument sales.

In *Elaine Powers, supra* at 1479 the Ninth Circuit also stated that

> our focus in this case is on the requirement that the seller have an economic interest in the tied product, i.e., that Elaine Powers has an economic interest in the Gillander's bookkeeping service.

The court in *Elaine Powers* then found that there were genuine issues of material fact as to the economic interest requirement.[14]

The economic interest of Kodak in its service and selling its new machines direct is obvious. It derived large revenues and benefits from the sale of Kodak service and new Kodak machines and had a strong interest in promoting their use to the exclusion of lower price competitors such as plaintiff ISOs and brokers.

F. Coercion

As long as "the buyer is free to take either product by itself there is no tying problem." *Northern Pacific supra* at 518 n.4. "Accordingly, we (the Supreme Court) have condemned tying arrangements when the seller has some special ability . . . to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish, supra* at 1559. The Supreme Court has stressed that when the forcing element is present, the Sherman Act is violated.

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[14] *See also United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369 (N.D. Calif. 1984). (Defendant had economic interest in tied product, automobile replacement parts. Dealers obtained parts from many sources. Even though defendant not sole seller of tied product, defendant had direct economic interest.)

The Ninth Circuit has stated that a modicum of coercion is also essential to a tying claim.

> The classic example of coercion in a tying arrangement is the Laerus' case, *supra* where the sale of the rights to several desirable films was conditioned on the television network's purchase of undesirable ones. Although some cases in other circuits have required a showing of actual coercion, our reading of the Supreme Court's opinions supports the view that coercion may be implied from a showing that an appreciable number of buyers have accepted burdensome terms, such as tie-in and there exists sufficient economic power in the tying product market. Coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes.

Moore II, supra at 1217.

The Court stated that even though the purchaser of a cemetary lot was not absolutely required to purchase a marker coercion can still occur.

> (In *Siegel*) we refused to accept appellant's individual coercion theory and we were not troubled by the fact there was no evidence to show that each of the 650 franchisers had been required to purchase the equipment, mixer and packaging. A showing of onerous effect on an appreciable number of buyers coupled with a demonstration of sufficient economic power in the tying market is sufficient to demonstrate coercion. (Citations Omitted)

Id. at 1217.

A showing has been made of coersive tactics by Kodak in selling its service and policing its parts monopoly. In a free market without coercion, customers would

no more pay 100% more for poorer quality service, as CSC and others were, without a supplier having certain coercive power.

IV. Concerted Refusal To Deal

Concerted refusals to deal fall in the category of "classic" group boycotts if they involve horizontal restraints from which business competitors seek to benefit by excluding other competitors from the marketplace. These are illegal per se under Section 1 of the Sherman Act. *Klor's Inc. v. Broadway Hale Stores, Inc.* 359 U.S. 297, 212 (1959).

Kodak's agreements to sell replacement parts to owners of Kodak equipment service bureaus and to Kodak brokers on the agreement by them that they will not resell these to Kodak's competitors in the Kodak micrographics and Ektaprint photocopy machine service area and its combination with the manufacturers of its parts to prevent ISOs from buying them at their source falls under the per se rule. Kodak has a monopoly position in these parts which is different from the "natural monopoly" it has over its own machines. It has been acquired by and depends on agreements with others for enforcement.

Unlike *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.*, (416 F.2d 71, 76 (9th Cir. 1969) *cert. denied* 396 U.S. 1062 (1970) there is a definite "anticompetitive," motive by Kodak in excluding plaintiffs and other Kodak ISO servicers from obtaining parts. It is distinguished from the cases discussed in *Hawaiian Oke* in that here,

there is an exclusionary and anticompetitive purpose. Kodak representatives have so stated. Kodak, service bureaus who service some of their clients' micrographics equipment, and self-servicers of micrographics equipment and Ektaprint photocopy equipment are all horizontal competitors. Kodak brokers are potential competitors. An agreement to exclude ISOs as competitors among these parties is *per se* illegal under *Klors* and its progeny.

It does not matter that the participants in the boycott may be coerced. As discussed in *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986):

> There is a line of cases that supports the proposition that a manufacturer may form a "conspiracy" or "combination" under the antitrust laws if it imposes restraints on . . . customers by coercive conduct and they involuntarily adhere to those restraints. *Albrecht v. Harald Co.* 390 U.S. 145, 149-50, 88 S.Ct. 869, 871, 19 L.Ed.2d 998 (1968), *United States v. Parke, Davis & Co.* 362 U.S. 29, 44-45, 80 S.Ct. 503, 511-12, 4 L.Ed.2d 505 (1960). . . .

It is clear that Kodak has exerted just such restraints on customers of Kodak parts by its coercive conduct, and on suppliers to prevent them from selling Kodak replacement parts which they have to its competitor ISOs. Such a "conspiracy" or "combination" may be found a per se refusal to deal under Section 1 of the Sherman Act. *See Black Gold Ltd. v. Rockwool Industries*, 729 F.2d 676 (10th Cir. 1984)

VII. "Hybrid" Refusal To Deal

The Ninth Circuit in *Dimidowich v. Bell & Howell* 803 F.2d 1473 (9th Cir. 1986) *modified* 810 F.2d 1517 (1987) found, with regard to distributors who deal with a manufacturer operating at two distinct levels of the distribution chain, acting both as a supplier, and a distributor of its own products that a "hydrid" arrangement of both vertical and horizontal elements existed. The court concluded that under the Sherman Act a rule of reason analysis, would be appropriate for a "hybrid" conspiracy such as this. *Id.* at 1481.

Kodak's relationship with service bureaus who sell Kodak film and other supplies and service as well, but who receive parts on the condition that they can not be resold, falls within the Ninth Circuit decision in *Dimidowich*. Proof of agreement between Kodak and service bureaus, who also provide service for which plaintiff Kodak ISOs compete would prove a "hybrid" arrangement, tested under the rule of reason for anticompetitive intent and anticompetitive effect. Since it is clear that the arrangements involving Kodak's concerted refusal to deal with ISOs have both anticompetitive intent and effect in foreclosing ISOs from the relevant market, and, since the alleged procompetitive effects of the "interbrand" market do not apply, plaintiffs have made out a case for violation of the Sherman Act under *Dimidowich*.

VIII.

MONOPOLY LEVERAGING

An attempt to monopolize may also be found under Sherman Act Section 2 for "monopoly leveraging". "Monopoly leveraging" is where a firm with monopoly power attained in one market attempts to use such power as leverage to gain a competitive advantage in another market. "Monopoly power is the power to control prices or exclude competition." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). To prove a §2 monopoly claim, a plaintiff must show "(1) possession of monopoly power in a relevant market, (2) willful acquisition or maintenance ('use') of that power, and (3) causal antitrust injury." *Catlin v. Washington Energy Company*, 791 F.2d 1343 (9th Cir. 1986), citing *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983).

This allegation was made, for example, in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). (Aloca's practice price squeeze on ingot supply constituted an unlawful exercise of Alcoa's monopoly power).

The *United States v. Griffith*, case 334 U.S. 100, 68 S.Ct. 941 (1948), which also involved an allegation of monopolization, established that the use of monopolistic success in one area to achieve an advantage in a second market may constitute a violation of Section 2 of the Sherman Act.

Circuit Courts of Appeals have likewise recognized that a defendant who utilizes its monopoly power in one

market to attempt to monopolize a second market violates Section 2 of the Sherman Act. Monopoly leveraging has been defined by the Second Circuit as "[the] use of monopoly power attained in one market to gain a competitive advantage in another." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2nd Cir. 1979). This theory of antitrust liability under §2 of the Sherman Act has yet to be endorsed by the Ninth Circuit but is awaiting a case which presents the requisite elements. *Catlin v. Washington Energy Co.*, 791 F.2d 1343 (9th Cir. 1986).

> The essential elements of a monopoly leveraging claim are: (1) monopoly power in a relevant market; (2) challenged activities in a defined second market, distinct from the first (monopoly) market; (3) 'use of advantages that [the monopolist] enjoys by virtue of size, integration, etc.'; (4) 'unwarranted competitive advantage' in the leveraged market; and (5) causal antitrust injury.

Id. at 1349, citing *Grason Electric Co. v. Sacramento Municipal Utility District*, 571 F.Supp. 1504, 1518-19 (E.D. Cal. 1983). This is that case.

Kodak is clearly using its acquired monopoly power in parts, even if legally attained, in the distinct market for Kodak service. It is obtaining an unwarranted competitive advantage over plaintiff ISOs, with substantial anticompetitive effects and injury.

IX.

SUMMARY JUDGMENT SHOULD BE DENIED UNDER RULE 56(f)

Plaintiffs are mindful of the Court's position on summary judgment as a means of defining and managing cases. Plaintiffs have, with this in mind, substantially narrowed their claims from the Complaint, in responding to this summary judgment motion. Issues as to which further discovery may be needed have been well defined in the summary judgment process, and this case defined.

Rule 56 and the case law provide that summary judgment should not be granted, absent issues going to the merits that provide an appropriate basis for summary judgment at such an early state of the litigation. These are not present here. Issues such as the statute of limitations, a statutory or implied exemption from the antitrust laws, the doctrine of *res judicata*, acts purporting to constitute a course of action which are legally insufficient, or, market facts which cannot constitute a relevant market as a matter of law, which would justify summary judgment, are not present here.

Rule 56(f) of the Federal Rules of Civil Procedure provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit the affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

The purpose of Rule 56(f), set out in Wright, Miller & Kane, Federal Practice and Procedure: Civil 2D, Section 2740, is as follows:

> The purpose of subdivision (f) is to provide an additional safeguard against an *improvident* or *premature* grant of summary judgment and the rule generally has been applied to achieve that objective. Consistent with this purpose, courts have stated . . . that it should be applied with a spirit of liberality (citations omitted). Where, as here, the knowledge to refute the facts propounded for summary judgment may be denied. *Collie v. Igoe*, 8 F.R. Serv. 56 C.41, Case 9 (D.C. New Jersey 1945). See also, *Kolton v. Halpern*, 260 F.2d 464 (2nd Cir. 1946). (Emphasis Supplied).

It has been held that the granting of summary judgment is in error when discovery is not yet completed. *Parrish v. Board of Commissioners*, 533 F.2d 942 (5th Cir. 1976), *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, 735 F.2d 653 (2nd Cir. 1984), *Sames v. Gamble*, 732 F.2d 49 (3rd Cir. 1984). The court must allow adequate discovery, and cases have found that this is particularly important when the relevant facts are exclusively in the control of the opposing party, as is often true in private antitrust cases. *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 294 (8th Cir. 1975), *cert. denied* 424 U.S. 915, 96 S.C. 1116 (1975), *Mossner Porsche Audi, Inc. v. Volswagenwerk*, 397 F. Supp. 71 (D.C. Wis. 1975).

Here, where defendants brought their summary judgment motion just four months into the action, before any discovery by plaintiffs, and, where discovery thereafter was limited to five depositions of defendant, one request for production of not more than 25 requests (without the availability of a motion to compel further production),

and one set of not more than 25 interrogatories, clearly further discovery on relevant issues is appropriate if the Court does not deny summary judgment.

If the court believes that a material issues of fact have not been raised by Plaintiffs as to any claim, Plaintiffs should be allowed, in fairness, to complete the discovery required as to the claims and facts set out herein, as such discovery is delineated in the Declaration of James A. Hennefer.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Defendant's Motion for Summary Judgment must be denied on the merits, or, that the Court should allow sufficient factual discovery to be taken on issues supported by the law set out herein, so that Plaintiffs can produce the evidentiary proof required on matters the Court finds cannot be determined as a matter of law.

Dated: February 1, 1988

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al.,	)	NO.
Plaintiffs,	)	C 87 1686 WWS
vs.	)	
EASTMAN KODAK COMPANY,	)	
Defendant.	)	

DECLARATIONS OF PLAINTIFFS IN OPPOSITION TO DEFENDANT KODAK'S MOTION FOR SUMMARY JUDGMENT

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3. Bradley Welch
4. Kim Tamvacakis
5. Kenneth Kastner

6. Stephen M. Searle
7. James Anderson
8. Michael Arnold
9. Ronald N. Varing

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	)	NO. C 87 1686 WWS **DECLARATION OF PAUL HERNANDEZ IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, Paul Hernandez, declare:

1. The facts stated herein are known to me of my own personal knowledge, except as stated, and if called to testify, I could and would competently testify thereto.

Background

2. I am presently President of Image Technical Service ("ITS"), Sacramento, California. ITS provides service and repair in the copier and micrographics industry, including service for Kodak Ektaprint copiers and Kodak micrographics reader-printers.

3. From 1967 through 1970 I served in the United States Marine Corp. and was trained in electronics. In 1972 I received an A.A. degree in computer technology from Los Angeles City College. I have taken additional courses in electronics since my graduation, and sales courses.

4. I was employed by the Eastman Kodak Company, Customer Equipment Service Division ("CESD"), as a service representative for 12 years, from 1972 to 1984. ITS was founded in 1984, and I joined the company in 1985.

5. I was trained by Kodak on the service of their micrographics equipment and the Ektaprint copier. I was fully trained and certified by Kodak's CESD in maintenance and operation of the Ektaprint photocopier. Both my technicians at ITS and I updated our knowledge of Kodak micrographics machines through manuals purchased directly from Kodak. In the copier area, both my technicians and I have been trained on updates for the Kodak Ektaprint models from recently Kodak trained technicians.

The Kodak Micrographics and Photocopy Machine Repair Market

6. The Kodak micrographics cameras, processors, reader-printers and Ektaprint copiers require special tools, parts, and manuals, with updates of manuals, in order to service them. In order to service these Kodak machines a technician must have special training, and obtaining this training requires a commitment of time and money by ITS or other independent service companies before the technician can adequately provide such

service. It takes about one year's training before a technician is fully proficient and profitable as a service representative of ITS.

7. The Kodak micrographics machines and Ektaprint copiers are specialized machines. Publications for the training required for the Ektaprint are written in Kodak International Service Language "KISL" and are available only through Kodak's Rochester offices.

8. The photocopy industry and the consumers of photocopy services consider the service of Kodak machines as distinct from other machines. The machines were specialized, requiring Kodak training, tools, parts and manuals. Owners of Kodak equipment were extremely hesitant to go to anyone but Kodak for such service even if non-Kodak service existed, which it often did not.

9. The Kodak equipment owners are reticent to change away from Kodak, and will not usually do so for a small change in price, as for example a 10% lower price. ITS was able to obtain service contracts from Kodak customers only because of Kodak's high prices and, often, the poor quality of its service.

10. The micrographics industry, and consumers of micrographics products consider the service of Kodak machines as distinct from other machines. The machines are specialized, requiring Kodak training, tools, parts and manuals. Kodak micrographics machine owners are hesitant to use non-Kodak service unless their service has been very bad or the prices very unreasonable. Kodak machine owners would not change away from Kodak

service for a small price differential, like 10%. The reduction in price would have to be in the vicinity of 20%.

11. Kodak developed its own service technicians and service representatives to service Kodak micrographics equipment and the Ektaprint photocopiers. In most areas of the United States with which I am familiar, no significant independent service organization developed. The area that can be serviced with a three hour response time on copiers would have to be within a 25 mile radius. In Los Angeles, no independent service organizations had developed for the servicing of Kodak Ektaprint copiers. None had developed in Sacramento in service contracts until approximately July 1984, and the advent of ITS. ITS is now the only independent servicing organization for the Kodak Ektaprint photocopier in this area. The only other independent service in the area is in San Jose and it services only large, high production machines such as IBM, Kodak and Xerox. There are fewer than ten in the whole United States.

12. Kodak's prices for service of Kodak micrographics equipment and Ektaprint machines are extremely high when compared to the cost of providing that service. As an example, Kodak was charging Computer Science Corporation of Sacramento $200,000 for annual service contracts on all its micrographic machines, which ITS thereafter acquired, and gave better service on these machines, at just over $100,000. ITS is still able to realize a profit of over $50,000 on these contracts.

13. Kodak photocopy machines and machine service are substantially different from the service for Xerox, IBM, or other photocopy machines because of the special

training, special tools, special parts, special manuals, and special technical needs of these machines, and because of the restrictions on entry into the market, including those imposed by Kodak itself as set out herein.

14. Customers for Ektaprint photocopiers are mostly unaware that any third-party independent service organizations have arisen.

Kodak Policies Regarding Sale of Service Parts

15. In founding ITS as an independent service organization ("ISO") I was aware of the fact, and depended on the fact, that the "Terms of Sale" for parts of Kodak that CESD provides as one of its "CESD Replacement Parts Principals" includes the statement that "Kodak distributes parts throughout the world and does not rely upon dealers, agents, or distributors in the U.S. to perform this distribution function. Therefore, Kodak will sell replacement parts to any party who intends to use them to repair Kodak equipment." Said terms of sale also provides that "if, at any time, it becomes necessary to discontinue shipments to any of its customers, to revoke or modify any of these terms of sale, or to allocate distribution of any of its products, Kodak shall take whatever action in its judgment is fair and appropriate." In 1984, I specifically called Kodak Parts Services and asked whether I could buy photocopy and micrographics parts for ITS's repair services from Kodak, and was told that I could. These Terms of Sale are attached hereto as **Exhibit A**. Kodak did not change these Terms of Sale to reflect its new practice until December 2, 1985 and December 1, 1986 as set out in **Exhibit B** and **Exhibit C** hereto.

16. In 1984 and early 1985 ITS purchased from Kodak all of the parts it needed for servicing its customers' Ektaprint copiers. Kodak never at any time until July 1985 informed ITS in writing that it would not sell copier parts for service. Another ISO, Chapin Precision Industries, had also ordered and received large numbers of Ektaprint copier parts and tools for service of other parties copiers. ITS purchased from Kodak, in 1984, as independent repair service organizations had for decades, all the parts needed for repair of Kodak micrographics machines.

17. Prior to July 1985, Kodak sold replacement parts, tools, test equipment, service manuals and specifications for Ektaprint machines to ITS. In reliance upon the policy of Kodak stated to me, and these sales, and in reliance upon the Terms of Sale of CESD for the sale of parts, ITS purchased replacement parts, tools, test equipment, service manuals and specifications for the servicing of Kodak photocopying machines; it recruited, hired and continued the training of Kodak-trained personnel with expertise in the servicing of Kodak photocopy machines; it developed a customer base for the service of Kodak photocopy machines; and it bid for large government contracts, including contracts for the State of California, and four large contracts in the private sector.

Kodak's Actions To Drive ITS Out Of Business As An ISO

18. In the micrographics field, the steps which ITS has experienced Kodak taking to drive ISOs out of business are: 1) the refusal to sell parts at all for newer equipment, (so that ITS will gradually be edged out of the

market, as their customers acquire larger and larger amounts of such equipment or be terminated by customers who acquire some new equipment and will not split their service between Kodak and ITS); 2) delays in parts shipments, particularly "rush" orders, and critical parts, (so that ITS's customers' machines will be "down" for long periods); 3) the raising of prices for parts (already priced well above the cost of these parts); 4) Kodak refusing to allow, even long in advance, the ordering of enough parts for ITS to inventory; 5) Kodak pressuring OEM's not to sell parts to ITS; and, 6) Kodak telling ITS customers that ITS will not be able to get parts or will be out of business.

19. Beginning in or about July 1985, Kodak instituted a policy of refusing to sell parts directly to certain ISOs like ITS who were servicing Kodak photocopy machines or to others who supply these parts to ISOs like ITS.

20. On April 24, 1985, ITS was awarded a contract by the State of California Mental Health Department for the servicing of its Kodak Ektaprint photocopy machines. On May 17, 1985, ITS was awarded by the State of California, Department of Finance, a contract for the service of the Kodak Ektaprint photocopy machines. Both contracts were awarded through the competitive bid process. ITS and Kodak were the only bidders. The contracts were to begin July 1, 1985.

21. In or about June or July 1985, despite the prior sales to ITS, despite its "Terms of Sale", and despite sales of parts, tools, test equipment, supplies, service manuals and specifications to parties outside of the CESD service

organization, including owners of Kodak Ektaprint photocopy machines and other independent service companies not competing so directly with Kodak, Kodak first began to refuse to sell to ITS parts, tools, test equipment, supplies, service manuals and specifications for the service of Kodak Ektaprint photocopy machines.

22. On June 12, 1985 and on July 2 and July 9, 1985, a total of eight orders were placed by ITS to Kodak for replacement parts and supplies for Ektaprint photocopying machines as they had been placed and filled in the past, and control numbers were provided for such orders. Without notice to ITS these parts were never shipped by Kodak. On July 16, 1985, in response to an inquiry about orders that had not been shipped, an employee of Kodak stated that Kodak would not sell ITS replacement parts for the Ektaprint photocopying machine any more. No reason was given for this change in practice towards ITS.

23. Prior to April, 1985 ITS had been informed by Kodak that it could purchase service modules for the servicing of Ektaprint photocopying machines if it owned an Ektaprint machine no matter where it was purchased. Such service modules were required equipment for the servicing of Kodak Ektaprint photocopying machines. In reliance on that information, ITS purchased an Ektaprint 100AF photocopying machine. ITS was then told by Kodak that service modules would only be *leased* to people who owned Ektaprint copying machines, and then that Kodak would not sell or lease ITS a service module, even though ITS owned their own Ektaprint photocopying machine.

State of California Contracts of ITS, Blacklisting

24. ITS was able to procure contracts for four State of California departments to service their Ektaprint copiers. The departments were, in addition to the Mental Health Department, the Department of Transportation, Department of Health Services, and the Department of Finance. These were procured through the bid process. There were, at that time, some 53 other Ektaprint machines at the State of California which were not put out to bid but remained locked into Kodak on full price Kodak contracts because ITS, having had its parts so severely curtailed, could not go after this business.

25. ITS began to purchase Ektaprint photocopy parts, tools, test equipment, supplies, service manuals and specifications through Far West Micrographix, which owned and serviced its own Ektaprint copy machine.

26. ITS purchased micrographic parts through Visual Graphix Inc., which was a bona fide Kodak broker allowed to purchase and resell many other Kodak products. Visual Graphix has been allowed to purchase micrographics parts on an unrestricted basis because it did not compete with Kodak as an ISO. One of the written conditions for Visual Graphix to be a Kodak broker of equipment is that Kodak must install and service the machines Visual Graphix sells. Visual Graphix cannot compete with Kodak on service.

27. Far West and ITS are affiliated companies as a result of a large common shareholder and founder of those companies. In September, 1985, Kodak, knowing of

this connection of Far West and ITS, and despite continued sales of Ektaprint photocopying machine parts, tools, test equipment, supplies, service manuals and/or specifications to owners of Ektaprint photocopying machines, also refused to sell said items to Far West.

28. Replacement parts, tools, test equipment, supplies, service manuals and specifications for the Ektaprint photocopying machines, which Kodak has now refused to sell directly or indirectly to ITS, are absolutely necessary for the maintenance and repair of Kodak Ektaprint photocopying machines under the contracts with the State of California and other entities obtained by ITS in direct competition with Kodak.

29. If ITS is unable to perform on its contracts to service the Ektaprint photocopying machines with the State of California, it will by "black-listed" for State contracts, preventing it from submitting bids for a period of seven years.

30. ITS has competed directly with Kodak for State of California contracts not only in the area of Ektaprint photocopying machines, but in the service of micrographics machines as well. The yearly maintenance contract for the Department of Mental Health for 1987 was $8,988 based upon 100,000 copies on their Ektaprint 150AF copier. The contract for the Department of Transportation was $7,368 for the same number of copies on their 150F. Kodak's published prices for these were $28,969 and $26,868, respectively.

31. In 1984, prior to entering the bidding competition for the State of California contracts for service of Ektaprint photocopying machines, ITS successfully bid

against Kodak and received contracts for the servicing of micrographics equipment in ten State of California departments, including the Department of Transportation, Department of Water Resources, Department of Vital Statistics, Department of Food and Agriculture, Board of Equalization, State Controller's Office, Office of Disbursements, Department of Health Services, Treasurer's Office and Teacher Licensing.

32. The "black-listing" of ITS by the State of California would prevent it from bidding, and eliminate it as a competitor to Kodak, both in the service of Ektaprint photocopying machines and all micrographics machines not only for current contracts but into the future. Kodak, as in the past, would charge full list price for its service contracts, which list price had been reduced in State bids because of ITS's competition.

33. In addition to cutting off parts, Kodak has represented to the State of California, that it would not guarantee the seven year useful life of an Ektaprint copier, if it were serviced by anyone other that Kodak. This policy had never been set out to this date, and was promulgated by Kodak in response to ITS requesting that the State departments go out to bid on service for their Kodak Ektaprint copiers.

Effects of Kodak's Elimination of Competitors

34. The elimination of competitors of Kodak in the service of photocopy machines for the State of California, as with private business, has meant that the customers are paying substantially greater prices for their services.

35. In the San Jose area, where Chapin Precision Industries serviced Kodak Ektaprint copiers, and had 15 units on service, the price at which service was being provided to these Kodak Ektaprint owners was substantially lower than Kodak's list price. Since, as a result of Kodak's changed parts policy, Chapin went out of business, Kodak has regained those accounts, and the accounts are back at Kodak's standard published prices.

Useful Life of Copiers and Micrographic Equipment

36. With regard to the useful life of Kodak Ektaprint copiers, the useful life can be fourteen years or longer. In fact, after the Kodak Ektaprint 150 copier with a reduction feature was introduced, all copiers thereafter, including the Kodak Ektaprint 200, 225, 235, 250, 300, and 350 were based on the Ektaprint 150 concept with different "bells and whistles." A Kodak Ektaprint 350 can be made out of a 150 chassis. In fact, a majority of the parts are interchangable among all Kodak Ektaprint copiers regardless of model or age.

37. The useful life of Kodak micrographics equipment is just as long, or longer. There are still numerous Kodak 600 series cameras which came out in the late 1960's which are still very servicable. There are a large number of Kodak 700 cameras which came out in the early 1970's which are functional and still very good cameras. The Prostar Processor ("DVR") first came out in the 1960s and is still the basic processing unit, with many of these still in the field. The Prostar II which came out around 1982 does not contain major technological

improvements or functional features from the basic Prostar. Kodak has now refused to service DVRs anymore.

38. Nevertheless, Kodak has pushed the "obsolesence" of equipment, through the refusal to service it as a method of selling new equipment.

39. For example, Kodak stated to the City of Sacramento Police Department that their Kodak Miracode system was too old and that Kodak was not going to offer service on it. The Kodak salesman named "Bernie" told me while I was still at Kodak that Kodak was not to give this account good service because he wanted to be assured he would sell it new equipment. ITS came in and offered a contract to the City of Sacramento Miracode, and, as a result, the City did not buy the new Oracle machine which Kodak was trying to push on the City, which the Oracle system would not have been an adequate system for the City. As a result of ITS's service, the City of Sacramento had time to locate an adequate system and ITS maintained its Miracode system in good working condition for one and a half years.

Kodak's Locked In Customers

40. Kodak took advantage of the fact that it had customers locked into equipment and systems before ITS competed for the service on those systems.

41. For example, the County of Sacramento Sheriff's Department has a Kodak Oracle retrieval system. While this system was not adequate for their needs from the day it was sold by Kodak to them, from a financial and operational standpoint, they were unable to trade it in on

new equipment. Financially, they have about $100,000 invested in the Kodak Oracle System. Were they to sell these on the used market, they would be worth less than $5,000. Operationally, they have thousands of tapes which work only on this system. The costs of converting these tapes to another machines' format would be tens of thousands of dollars.

42. An even more graphic example of a company "locked in" to Kodak equipment is Computer Science Corporation ("CSC") which is in the business of claims processing for health and dental benefits for governmental entities. They have contracts with the State of California, State of Washington, and State of Colorado to process health and dental benefits administered by the State.

43. In connection with CSC's processing of claims, they use record keeping devices which include a combination of micrographics machines and computer output hardware and software tailored to our needs.

44. Their equipment includes the following Kodak equipment: Ninety-eight IMT 150 Microimage terminals; two Prostar processors, two Starfiche reader-printers and two 750 intelligent control microfilm units.

45. The Eastman Kodak Company serviced all of their micrographics equipment up until March 1986.

46. CSC decided to move away from Kodak services because the prices being offered by ITS were much more attractive, and because ITS agreed to provide more expeditious services, including having an in-house service representative.

47. CSC, because of the combination of machines, software used, and applications for that software, and the capital invested in their machines and in the training of their employees, could not possibly switch from Kodak machines to another brand. They are totally dependent upon the Kodak machines, because the replacement of the special applications which they have prevents them, as a practical matter, and as a financial matter, from switching to any other variety of micrographics machines. The replacement of their equipment, net of the residual value of the old equipment (which is low) would exceed $1,500,000. The cost of additional applications software could run several hundred thousand dollars, as would the reformatting of data and the training of personnel.

ITS Competition With Kodak at CSC

48. ITS competed directly with Kodak in 1986 for the maintenance contracts of CSC in Sacramento, California.

49. CSC was dissatisfied with Kodak's service because the prices were too high, and because Kodak did not give expeditious service to CSC.

50. Whereas Kodak had put a weak service representative on the CSC account and refused to allow him to be located on site (even though there were enough machines to comprise one and one-half service territories), ITS put one of its strongest technicians, Randy Ward, in that location, and agreed to station him on

CSC's premises. ITS, after extensive negotiations, undertook the maintenance of all of CSC's Kodak micrographics equipment for just over $100,000 per annum, saving the CSC 50% on the $200,000 per annum being charged by Kodak.

51. ITS allowed CSC to pay quarterly payments, whereas Kodak had charged them full price up-front for its $200,000 maintenance contracts.

52. With its in-house service representative at CSC, and with extra machines at ITS which can replace any "down" machine at CSC, or from which machines assemblies can be taken out and can replace assemblies at CSC, ITS has provided more reliable and substantially more expeditious service than Kodak provided, with much less down time.

53. Our technician, Randy Ward, fixed, in a period of approximately two weeks after ITS took over the contract at CSC, three micrographics machines that had not been working for six months under the Kodak service agreements.

54. Despite ITS's contract with CSC, there has been substantial concern by CSC over the fact that on newer Kodak equipment such as the Kodak Reliant 2000 camera, which CSC is acquiring, ITS cannot obtain parts. Additionally, as a result of statements made by Kodak to CSC, CSC has become concerned about ITS's ability to continue to get replacement parts to honor its existing contracts with CSC. Paul Gilberson of CSC reported to me that Jack Lacy and a group of "Kodakers" in Rochester, New York, at a meeting he attended, indicated he was foolish to

have ITS service because Kodak had ISOs "by the balls" on replacement parts.

Competition For Service Of Machines Independently Serviced

55. ITS provides service for number of manufacturers' micrographics equipment which manufacturers depend on independent service organizations rather than in-house service. These include Micron, Microdesign, Information Design, Alos and Fuji. The service market in these micrographics machines, with numerous independent service companies all providing service, is highly competitive on price and quality of service. Service is sold separately from the machines, and is competed for by all providers. With a large user of these machines, I have never been aware of any situation like CSC, where grossly inflated prices for service of poor quality were exacted.

56. ITS also reconditions and resells used Ektaprint copiers. Through this, I have a great deal of knowledge as to the prices of used Kodak equipment since 1984. In 1984 we purchased a 100AF Kodak Ektaprint copier which was approximately 10 years old for $15,000. We recently purchased an upgrade of the 100AF, a 150AF Ektaprint copier, which was not as old as the 100AF. We purchased this 150AF for only $2,500. Through our information on the market prices on which used Kodak Ektaprint copiers have been selling, we have obtained prices of hundreds of used Kodak Ektaprint copiers during the period 1984 through 1988. Since Kodak instituted its policies for tightening up parts and for making it difficult to obtain Kodak

service and reconditioning of used machines, the prices at which used Kodak Ektaprint copiers are sold, for comparable models and of comparable age, have dropped precipitously.

57. This is particularly anomalous because at the same time the volume of these machines coming on the market has decreased substantially (even though there are many more Ektaprint copiers in service). Because of the lack of value for used Ektaprint copiers, fewer and fewer owners of Kodak Ektaprint copiers are trading these in to other manufacturers (from whom we purchase machines) or selling them on the open market (where we also purchase machines). These customers are locked into these Kodak machines because of the law on dual value of the machines, unless they trade them in for new Kodak machines.

58. Kodak's trade-in schedules do not reflect the value of used Ektaprint copiers on the open market, but are many times their value. For example, a Kodak Ektaprint 150AF that sold on the open market in 1987 for $2,500 could be traded in for another Kodak Ektaprint (depending on the model) for a price as high as $18,000, seven times its value on the open market. This wide disparity occurred only in the past two years since Kodak's practices have cut off almost entirely the flow of replacement parts to ISOs for Ektaprint copiers, and since the inordinately restrictive policies of Kodak on Kodak service and reconditioning have taken effect.

59. Kodak, with respect to control of Ektaprint copier parts has gone well beyond just the control of direct sales to third party services. They have threatened

to terminate sales to anyone who sells parts to ITS, and have accused me of taking parts while at Kodak and buying stolen parts, which is categorically untrue.

Attempts to Purchase From Kodak's OEM's

60. ITS attempted to purchase replacement parts for both photocopy and micrographics machines from purportedly "independent" suppliers of Kodak. Acme Electronics of Cuba, New York refused to sell any parts to ITS, since it stated that its parts were "proprietary" to Kodak. Barber Coleman Company was also contacted, and refused to sell ITS parts because of its "arrangement" with Kodak. ITS tried to acquire power supplies from Sola Electric of Elk Grove, Illinois, who declined to sell parts for any Kodak machines because of the "arrangement" they had "in force" with Kodak. A letter from Barber Coleman Company refusing to sell ITS parts since the part "is proprietary to Eastman Kodak" is attached hereto as **Exhibit D.**

Customer's Selection of Equipment

61. From my experience at Kodak and ITS, customers, including the Instant Copy Service which I am a partner in, do not go through a life cycle cost analysis for machines before purchasing the machines.

62. In some cases, like Federal government agencies, different departments purchase micrographics and photocopy equipment from the departments who pay for the service. The Department of Defense purchases equipment for the Air Force. Yet when service is ordered from

ITS for McClellan Air Force Base micrographics and photocopy machines, the base buy and pays for that service separate from its machine purchases.

Kodak Share Of The Service Markets

63. There are fewer than ten independent service organizations servicing Kodak Ektaprint copiers in the United States. From a review of Kodak's documents produced in this case, including those of Lynn Brockmann Gleason, of the statistics in Kodak's declarations in support of their motion, of the depositions in this case, and other Kodak depositions, and from my experience as an ESR with Kodak, I would calculate that Kodak has over 95% of the service of its Ektaprint copiers.

64. From a review of Kodak's documents produced in this case, and the case of *Far West v. Kodak,* including the list of all identified BENUs (Kodak micrographics ISO competitors), the statistics in Kodak's declarations in this case and in *Far West v. Kodak,* of industry publications, and from my knowledge of the average Kodak service income of BENUs and as an ESR with Kodak, I would estimate that Kodak has over 80% of the service of its micrographics machines.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 1-24 day of January, 1988, at San Francisco, California.

/s/ Paul Hernandez
Paul Hernandez

EXHIBIT A

Effective Prior to 12/2/85

Terms Of Sale

Parts Supplied By Customer Equipment
Services Division Parts Services

1. Prices are FOB shipping point, unless otherwise specified, and are subject to change without notice, except written bids and quotations which are firm for 60 days to Federal, State, and Local Government customers, and 30 days to regular customers.

2. Prices do not include installation.

3. Any applicable local, state, or federal taxes are not included in the prices shown but will be added separately to the invoice.

4. Terms of payment: Subject to credit department approval, Net 30 days EOM from date of invoice.

   Billing period – Transactions on the 26th day of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date for each month will be the 25th, and this day will be used consistently throughout the year.

5. All items supplied by parts services are sold without return privileges except for items which are returned for warranty service consideration, damaged in transit, or shipped in error by Kodak. Other returns require prior authorization of parts services and if authorized are subject to inspection, handling and restocking charges. Requests for return must include part number, invoice number, and date of shipment.

   All items should be returned, transportation prepaid by the customer, to Eastman Kodak Company, Parts Service, Adjustment Section, 800 Lee Road, Rochester, New York 14650.

6. Parts orders are subject to acceptance by CESD at parts services, Rochester, New York.

7. If, at any time, it becomes necessary to discontinue shipments to any of its customers, to revoke or modify any of these terms of sale or to allocate distribution of any of its products, Kodak shall take whatever action in its judgement is fair and appropriate.

8. Kodak Manufactures and stocks parts to meet the repair needs of its equipment owners, dealers, distributors, and service outlets which are repairing, finished products distributed by Kodak. Kodak does not manufacture replacement parts to be used as components of other manufacturers' finished products.

9. All domestic "Non-Rush" parts orders shipped and billed from Parts Services, for Rochester, qualify for a 10-percent discount except items with a price code of F, M, or T. Parts Shipments made from A-Depots or by other CESD field services do not qualify for this special discount.

10. Warranty – Items (Except lamps and supply items) supplied by parts services are warranted by Kodak to fuction properly for one year from Kodak's billing date or three months from the date of installation, whichever occurs first. Kodak makes no other warranties, express, implied, or of merchantability for these items.

    If these items do not function properly within the warranty period, Kodak will repair them without charge. If Kodak is unable to repair them, the option of replacement will be available. These remedies are not available if the items are damaged by misuse or other circumstances beyond Kodak's control.

    Repair and the option of replacement, in the event that Kodak is unable to repair the items, are Kodak's only obligations. Kodak will not be responsible for

any consequential or incidental damages resulting from the sale or use of these items, even if loss or damage is caused by the negligence or other fault of Kodak.

Part Number Suffixes

The letters shown below may appear in the "Part Number" column. Always include the letters as a suffix to such part numbers in orders and correspondence.

AC Accessories – Training Packages for Repair of Equipment Accessories

C Designates a Manufacturing Plant

CA Certified Alteration

CG Instructor's Guide

CP CRI Course Package

CT Criterior Test (Trainee)

CW Designates A Manufacturing Plant

D Kits of Parts

DG Diagnostic Procedures (when printed separately from wiring diagrams)

DT Diskette Training for Computer Based Training

FN Fundamentals – provides training program for fundamentals needed to repair equipment

HC Hard Copy (these items are produced from Fiche for Data not Normally Printed on Hard Copy)

HE Designates a Manufacturing Plant

I Designates a Manufacturing Plant

K Designates a Manufacturing Plant

KP Designates a Manufacturing Plant

MB Modification Instructions – Type 2

MF Microfiche Card(s)

MN Mainframe Training Program to Repair Mainframe on a Family of Equipment

MP Manager's Package – For Training Class use

N Designates a Manufacturing Plant

PK Service Publication Package (Either Fiche and/or Hard Copy Items)

PL Service Publication Subscription Plan (same as PK but with updates for a Specified Time-Frame)

- 001 Intercompany 1-year Renewal
- 002 Renewal Subscription Charge for Trade Customers
- 003 Initial Subscription Charge for Trade Customers

RG Resource Guide – Service Publication

RM Resource Material for CRI Training Centers

SD Designates a Manufacturing Plant

SG Service Guide – Cards – Part of Service Publication

SI Software Instructions

SP Installation Instructions

SW Software

TG Theory Guide

TM Training Module (Trainee)

TP Training Package (Trainee)

TX Miscellaneous Publications (in course packages), Tapes, Slides, Etc.

WD Wiring Diagram

XP Publications not normally stocked at parts services

CESD Replacement Parts Principles

Kodak distributes parts throughout the world and does not rely upon dealers, agents, or distributors in the U.S. to perform this distribution function. Therefore, Kodak will sell replacement parts to any party whc intends to use them to repair Kodak Equipment. Orders will be accepted only from the customer to be billed.

Replacement parts stocks are maintained by Kodak at a level carefully planned to fulfill Kodak's commitments to those equipment or repair service dealers and distributors that regularly provide equipment repairs to Kodak Equipment, to users of Kodak Equipment who service their own equipment, and to customers who receive equipment service from CESD. If orders are received which would require shipment from stock that would reduce parts inventory below a stock level required to fulfill Kodak's scheduled commitments, Kodak may have to back order such orders. Parts for such back orders may not be available for shipment until a special parts order can be filled by Kodak Factories or outside vendors. The selling price of items filled through such a special parts order may differ from current part prices in effect on the

date that Kodak received the order because order quantities, date manufactured, special handling and rush requirements, and other factors may significantly influence the cost of procuring and supplying such orders.

Parts Services is responsible for administering these principles. Questions regarding orders which cannot be filled because they may not be compliance with this policy are directed to parts services. Parts services will refer to CESD management for interpretation or decision in any matters which are not covered by these principles.

CESD Exchange Parts Credit Section

Parts listed in this section may qualify for exchange credit. Customers who purchase from Kodak a replacement part listed in this section are eligible for an exchange credit if an identical part is returned to Kodak and that part has not been damaged, misused, modified, altered, or repaired by other than a Kodak authorized service representative.

Parts are subject to removal from the exchange parts credit list without notice.

The unit selling price and parts warranty apply to either new or fully reconditioned parts supplied by Kodak, at its option.

Customers are requested to return parts eligible for exchange credit to Eastman Kodak Company, parts services, 800 Lee Road, Rochester, New York 14650, and to include with such parts the following information:

Statement requesting "Exchange Credit" including date and source of replacement parts purchased; equipment model and serial number; and customer name and address returning the part.

Terms

1. Parts for exchange credit to be returned transportation repaid by customer to Eastman Kodak, company, parts services, Rochester, New York 14650.

2. Any applicable local, State, or Federal taxes will be added to the exchange credit and will be listed separately on the invoice.

3. Billing period – Transactions on the 26th day of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date of each month will be the 25th, and this date will be used consistently throughout the year.

4. All exchange part credit transactions are subject to acceptance by CESD, Rochester, New York.

5. Exchange parts credits, terms, and listings are subject to change without notice, except written bids and quotations which are firm for 30 days to regular customers and for 60 days to Federal, State, and Local Government customers.

EXHIBIT B

Effective 12/2/85

MB Modification Instructions – Type 2

MF Microfiche Card(s)

MN Mainframe Training Program to Repair Mainframe on a Family of Equipment

MP Manager's Package – For Training Class use

N Designates a Manufacturing Plant

PK Service Publication Package (Either Fiche and/or Hard Copy Items)

PL Service Publication Subscription Plan (same as PK but with updates for a Specified Time-Frame)

- 001 Intercompany 1-year Renewal
- 002 Renewal Subscription Charge for Trade Customers
- 003 Initial Subscription Charge for Trade Customers

RG Resource Guide – Service Publication

RM Resource Material for CRI Training Centers

SD Designates a Manufacturing Plant

SG Service Guide – Cards – Part of Service Publication

SI Software Instructions

SP Installation Instructions

SW Software

TG Theory Guide

TM Training Module (Trainee)

TP Training Package (Trainee)

TX Miscellaneous Publications (in course packages), Tapes, Slides, Etc.

WD Wiring Diagram

XP Publications not normally stocked at parts services

CESD Replacement Parts Principles

Replacement parts stocks are maintained by Kodak at a level carefully planned to fulfill Kodak's commitments to its equipment or repair service dealers and distributors that are authorized to provide repairs to Kodak equipment, to users of Kodak Equipment who service their own equipment, and to customers who receive equipment service from CESD. If orders are received which would require shipment from stock that would reduce parts inventory below a stock level required to fulfill Kodak's scheduled commitments, Kodak may have to back order such orders. Parts for such back orders may not be available for shipment until a special parts order can be filled by Kodak factories or outside vendors. The selling price of items filled through such a special parts order may differ from current part prices in effect on the date that Kodak received the order because order quantities, date manfucatured, special handling and rush requirements, and other factors may significantly influence the cost of procuring and supplying such orders.

Parts services is responsible for administering these principles. Questions regarding orders which cannot be filled because they may not be compliance with this policy are directed to parts services. Parts Services will refer to CESD management for interpretation or decision in any matters which are not covered by these principles.

CESD Exchange Parts Credit Section

Parts listed in this section may qualify for exchange credit. Customers who purchase from Kodak a replacement part listed in this section are eligible for an

exchange credit if an identical part is returned to Kodak and that part has not been damaged, misused, modified, altered, or repaired by other than a Kodak authorized service representative.

Parts are subject to removal from the exchange parts credit list without notice.

The unit selling price and parts warranty apply to either new or fully reconditioned parts supplied by Kodak, at its option.

Customers are requested to return parts eligible for exchange credit to Eastman Kodak company, parts services, 800 Lee Road, Rochester, New York 14650, and to include with such parts the following information:

> Statement requesting "Exchange Credit" including date and source of replacement parts purchased; equipment model and serial number; and customer name and address returning the part.

Terms

1. Parts for exchange credit to be returned transportation repaid by customer to Eastman Kodak Company, Parts Services, Rochester, New York 14650.
2. Any applicable local, State, or Federal taxes will be added to the exchange credit and will be listed separately on the invoice.
3. Billing period – Transactions on the 26th day of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date of each month will be the 25th, and this date will be used consistently throughout the year.

4. All exchange part credit transactions are subject to acceptance by CESD, Rochester, New York.

5. Exchange parts credits, terms, and listings are subject to change without notice, except written bids and quotations which are firm for 30 days to regular customers and for 60 days to Federal, State, and Local Government customers.

TERMS OF SALE

Parts Supplied By Customer Equipment
Service Division Parts Service

1. Prices are FOB shipping point, unless otherwise specified, and are subject to change without notice, except written bids and quotations which are firm for 60 days to federal, state and local government customers, and 30 days to regular customers.

2. Prices do not include installation.

3. Any applicable local, state, or federal taxes are not included in the prices shown but will be added separately to the invoice.

4. Terms of payment: Subject to credit department approval, Net 30 days EOM from date of invoice.

   Billing period – transactions on the 26th day of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date for each month will be the 25th, and this day will be used consistently through out the year.

5. All items supplied by parts services are sold without return privileges except for items which are returned for warranty service consideration, damaged in transit, or shipped in error by Kodak. Other returns require prior authorization of Parts Services and if authorized are subject to inspection, handling and restocking charges. Requests for return must include part number, invoice number, and date of shipment.

All items should be returned, transportation prepaid by the customer, to Eastman Kodak Company, Parts Services, adjustment section, 800 Lee Road, Rochester, New York 14650.

6. Parts orders are subject to acceptance by CESD at Parts Services, Rochester, New York.

7. If, at any time, it becomes necessary to discontinue shipments to any of its customers, to revoke or modify any of these terms of sale or to allocate distribution of any of its products, Kodak shall take whatever action in its judgement is fair and appropriate.

8. Kodak manufactures and stocks parts to meet the repair needs of its equipment owners, dealers, distributors, and service outlets which are repairing finished products distributed by Kodak. Kodak does not manufacture replacement parts to be used as components of other manufacturers' finished products.

EXHIBIT C

Effective 12/1/86

Terms of Sale

Items Supplied by Kodak Parts Services

Parts are stocked to meet the repair needs of Kodak's authorized dealers, distributors, service outlets, Kodak customer equipment services field engineers and equipment service centers, government users, and other users who purchased equipment directly from Kodak and who service only their own Kodak equipment. Kodak Parts Services does not supply replacement parts to be used as components of other manufacturers' finished products.

If, at any time, it becomes necessary to discontinue shipments to any buyer, to revoke or modify any of these terms of sale or to allocate distribution of any of our parts or products, Kodak shall take whatever action in its judgement is fair and appropriate

Parts orders are subject to acceptance by customer equipment services (CES) at Parts Services, Rochester, New York.

1. Prices: Prices are FOB shipping point, unless otherwise specified, and are subject to change without notice. Prices do not include installation.

2. Bids and quotations: Written bids and quotations are firm for 60 days to federal, state, and local government customers, and 30 days for all other authorized customers who are repairing finished products distributed by Kodak.

3. Taxes: any applicable local, State, or Federal taxes are not included in the prices shown, but will be added separately to the invoice.

4. Terms of payment: Subject to credit department approval, Net 30 days EOM from date of invoice.

   Billing period – Transactions on the 26th of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date for each month will be the 25th, and this day will be used consistently throughout the year.

5. Returns: All items supplied by Parts Services are sold without return privileges except for items which are returned for warranty service consideration, damaged in transit, or shipped in error by Kodak. Other returns require prior authorization of Parts Services and if authorized are subject to inspection, handling and restocking charges. Requests for return must

include part number, invoice number, and date of shipment.

All items should be returned, transportation prepaid by the customer, to Parts Services, Adjustment section, 800 Lee Road, Rochester, New York 14650.

6. Warranty: items (Except lamps and supply items) supplied by Kodak Parts Services are warranted by Kodak to function properly for one year from Kodak's billing date or for the time periods listed below from date of installation, whichever occurs first.

   Business imaging systems and copy
   products parts – One Month
   All other parts – Three Months

   Kodak makes no other warranties, express, implied, or of merchantability for these items.

   If these items do not function properly within the warranty period, Kodak will repair them without charge. If Kodak is unable to repair them, the option of replacement will be available. These remedies are not available if the items are damaged by misuse or other circumstances beyond Kodak's control.

   Repair and the option of replacement, in the event that Kodak is unable to repair the items, are Kodak's only obligations. Kodak will not be responsible for any consequential or incidental damages resulting from the sale or use of these items, even if loss or damage is caused by the negligence or other fault of Kodak.

CES Replacement Parts Practices

Replacement parts stocks are maintained by Kodak at a level carefully planned to fulfill Kodak's commitments to its equipment or repair service dealers and distributors

that are authorized to provide repairs to Kodak equipment, to users of Kodak Equipment who service their own equipment, and to customers who receive equipment service from CES. If orders are received which would require shipment from stock that would reduce parts inventory below a stock level required to fulfill Kodak's scheduled commitments, Kodak may have to back order such orders. Parts for such back orders may not be available for shipment until a special parts order can be filled by Kodak Factories or outside vendors. The selling price of items filled through such a special parts order may differ from current part prices in effect on the date that Kodak received the order because order quantities, date manufactured, special handling and rush requirements, and other factors may significantly influence the cost of procuring and supplying such orders.

Parts services is responsible for administering these practices. Questions regarding orders which cannot be filled because they may not be in compliance with this policy are directed to Parts Services. Parts Services will refer to CES management for interpretation or decision in any matters which are not covered by these practices.

CES Exchange Parts Credit Section

Parts listed in this section may qualify for exchange credit. Customers who purchase from Kodak a replacement part listed in this section are eligible for an exchange credit if an identical part is returned to Kodak and that part has not been damaged, misused, modified, altered, or repaired by other than a Kodak authorized service representative.

Parts are subject to removal from the exchange parts credit list without notice.

The unit selling price and parts warranty apply to either new or fully reconditioned parts supplied by Kodak, as its option.

Customers are requested to return parts eligible for exchange credit to Eastman Kodak Company, Parts Services, 800 Lee Road, Rochester, New York 14650, and to include with such parts the following information:

> Statement requesting "Exchange Credit" including date and source of replacement parts purchased; equipment model and serial number; and customer name and address returning the part.

Terms

1. Parts for exchange credit to be returned transportation prepaid by customer to Eastman Kodak Company, Parts Services, Rochester New York 14650.
2. Any applicable local, state or federal taxes will be added to the exchange credit and will be listed separately on the invoice.
3. Billing period – Transactions on the 26th day of each month and the remaining days within that month will be considered part of the following month's purchase. The cutoff date of each month will be the 25th, and this date will be used consistently throughout the year.
4. All exchange part credit transactions are subject to acceptance by CES, Rochester, New York.
5. Exchange parts credits, terms, and listings are subject to change without notice, except written bids and

quotations which are firm for 30 days to regular customers and for 60 days to Federal, State, and Local government customers.

EXHIBIT D

[ ] Colman Motor Products
[ ] Colman AC Motors
[ ] Colman OEM Motors

BARBER
COLMAN
COMPANY

May 28, 1987

Image Technologies
4443 Auburn Blvd.
Suite N
Sacramento, CA 95841

Attn: Paul Hernandez

Dear Mr. Hernandez:

Per our conversation on May 18, 1987 regarding our FYQM 33610-10 motor. We cannot sell that motor to your company because it is proprietary to Eastman Kodak.

Regards,

/s/ Marta Jones
Marta Jones
Sales Correspondent

MJ/tb

Jim,

For your information on proprietary parts.

Paul Hernandez

Barbar-Colman Company
Motor Division

Mailing Address
P.O. Box 2248
Loves Park, IL U.S.A.
91158-2940

Office Location
1881 Rock Street
Rockford, IL U.S.A. 61101

Phone: (813) 633-2442
ITT Telex 433337

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS **DECLARATION OF JOHN DAMIANI, JR. IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, JOHN DAMIANI, JR., declare as follows:

1. The facts stated herein are known to me of my own personal knowledge except as so stated, and I could competently testify to them if called upon to testify.

Background of J-E-S-P

2. I am the General Manager of J-E-S-P Company, a company which offered microfilm equipment sales, service and supplies, primarily to Eastman Kodak micrographics equipment. As of September 1986, J-E-S-P had 129 customers for service of their Kodak micrographics equipment on a per call (time and material) basis or under yearly maintenance contracts. These 129 customers owned 1,911 pieces of Kodak micrographics equipment.

3. 51 of these 129 J-E-S-P customers have yearly maintenance contracts with J-E-S-P. In 1977, J-E-S-P earned 98% of its income from the servicing of Kodak equipment. However, because of statements by Kodak personnel, during 1984, that Kodak was planning to take action to inhibit the activities of third party service companies through parts, J-E-S-P implemented a redirected effort to support and sell equipment of other manufacturers. This effort has continued, and as of October of 1986, we had reduced our dependency on Kodak to 41% of our income.

4. The following table indicates our growth in the area of Kodak machines through 1983, and the substantial cutbacks in growth as a result of Kodak's parts policy.

J-E-S-P
Customer Growth in Micrographics Service
of Kodak Equipment

Year	Total Kodak Customers	New Kodak Customers	Total Kodak Machines Under J-E-S-P Service	New Kodak Machines Under J-E-S-P Service
1978	9	9	175	175
1979	12	3	222	47
1980	19	7	466	244
1981	25	6	605	139
1982	32	7	637	32
1983	41	9	717	80
1984	48	7	737	20
1985	49	1	743	6
1986	51	2	749	6

5. J-E-S-P, when first founded by me, was able to enter the service industry marketplace for Kodak machines, even though customers questioned the ability of a single technician, starting his own business, to give reasonable response time. I overcame customer concerns through the following:

A. J-E-S-P Company charged less than Kodak for service;

B. J-E-S-P Company worked longer hours and was available more than Kodak CESD technicians;

C. J-E-S-P repaired older equipment which Kodak stated it was not willing to repair and as to which Kodak attempted to sell new equipment in replacement of;

D. Customers were annoyed by Kodak's high prices; and

E. Customers were annoyed by Kodak's arrogance to the customer.

6. One account, which is an example of these elements, is the European American Bank in New York City. In 1980 the Bank looked for alternative microfilm equipment maintenance for their Kodak machines. The Bank was angry with Kodak because Kodak had pressured the Bank to update their Kodak RW600 microfilmer with new Kodak equipment. Kodak represented that in a few years the replacement parts for many of the Bank's branch office Kodak model RW600 microfilmers would not be available and no service contracts would be offered by Kodak. J-E-S-P began servicing the Kodak RW600's in

1980, and J-E-S-P is still servicing many of these European American Bank microfilmers which are giving good service to the present. European American Bank, further, has assigned the service responsibility for other Kodak equipment, used by them, to J-E-S-P.

Background Of John Damiani, Jr. in Micrographics

7. I was employed by the Eastman Kodak Company from 1951 to 1977. These 26 years of employment by Kodak as micrographics service representative for CESD gave me an extensive background in the servicing of Kodak micrographics equipment. I was also familiar with the prices and marketing Kodak employed for service contracts, since I sold these during my tenure with Kodak. I won first place in a New York Region service contract selling contest. I finally determined to leave Kodak because of a dispute over their policies on older aged employees.

The Service of Micrographics as a Separate Industry

8. During my 26 years with Kodak, Kodak had always regarded the micrographics service department as a separate branch. In 1951 when I first joined the Kodak micrographics subsidiary, Recordak Corporation, I was assigned to the New York City branch office. The sales manager of the New York City branch office was also the branch manager. The service department, on the other hand, was run by a separate service supervisor. This is still true today, where Kodak has separate district sales managers, and district service managers.

9. Kodak's emphasis in the micrographics ("BISD") area was on the marketing and sales of new equipment. Selling machines and supplies was paramount. After the sales of new machines and the sales of supplies, the service revenue took a third place in the realm of profit.

10. In the 1970's, service representatives for Kodak were repeatedly reminded that the service department was a separate, self-supporting division and was expected to produce a profit for Kodak. Kodak was run as a two-industry, complimentary-effort company; i.e., (1) selling machines and supplies, plus (2) selling service. Kodak had done well competing for machine sales against companies like Burroughs, Bell and Howell and others. Kodak also had done well in competing for the lucrative supplies/film sales against companies like 3M, Rochester Film Company and others. Kodak up until this time had no competition in the service industry for Kodak micrographics machines.

The High Prices For Kodak Micrographics Service

11. Without competition in the service industry Kodak was able to charge very high prices for its service. I made a analysis of the financial characteristics of the service territory which had been assigned to me by Kodak before I decided to go into the Kodak micrographics service industry. In doing this financial analysis I took the prices Kodak charged for service contracts and my customer list, and compiled a dollar figure for Kodak revenues from customers who had contracted for Kodak service within my territory. Kodak contract earnings were

approximately $300,000, on machines which were my service responsibility. Taking my $18,000 per year salary, approximately $30,000 per year in parts and adding generous figures to cover fringe benefits, company car, tools, training and support, the resulting cost to Kodak for my servicing those contracts was under $80,000.

12. This financial calculus convinced me that I could go into the third party service market and, provided parts were available, could compete with Kodak head-to-head in the service industry by charging less, working longer hours, repairing equipment which Kodak refused to repair, and taking advantage of customers' annoyance at Kodak's high prices and arrogance. This I did, and built the J-E-S-P Company.

J-E-S-P Training and Parts Inventory

13. J-E-S-P personnel, in addition to training received and experience derived through working with Kodak, spent substantial individual time researching, reading technical literature, attending schools that are available and speaking to technically proficient friends. At J-E-S-P, as well as with other motivated service industry technicians, learning and applying the new technologies, even without Kodak's direct assistance, has been a commitment, even though it has proved time consuming and costly.

14. In areas where Kodak, or any other micrographic company has provided quality service at a reasonable price, independent service organizations,

including J-E-S-P, have found it difficult to acquire customers. In 1982, for example, Pan American World Airways, on its own, went looking for alternative microfilm equipment maintenance service for 3M equipment which was located at Kennedy Airport in New York City. Pan Am was looking for such service because they were upset by the service they were receiving from the 3M Company. They located J-E-S-P, and we undertook to maintain their micrographic equipment, and do so to this day. The poor quality of 3M service in the New York City Region is not the case with the 3M service in New Jersey. Because of excellent 3M Company service in New Jersey, it has been extremely difficult for J-E-S-P to compete for 3M customers in New Jersey.

Kodak's Actions Against Third Party Services

15. With regard to Kodak service, J-E-S-P was able, as shown in the chart in paragraph 4, to take an increasing number of customers and machines from Kodak. J-E-S-P began hearing in the early 1980's directly from Kodak personnel, as well as from customers, that Kodak was upset with the J-E-S-P Company for taking away their service customers. We heard comments directly from Kodak sales and service personnel that Kodak was planning to do something about this new competition. These rumors increased through 1984 and consummated first in Kodak's refusal to sell new equipment parts in 1985 and then in the letter from Joseph O'Brien of July 18, 1986 announcing Kodak's new change in policy with regard to restrictions on parts for older equipment.

16. We have learned, that as a result of this new policy, J-E-S-P has been designated a BENU "Business Equipment Non-User" (which is synonomous with third party service), and that Kodak has adopted a number of policies which, experience has confirmed, are directed at killing third party service.

17. Among these policies experienced by J-E-S-P, are: (1) The delay of orders, particularly rush orders, which are crucial for J-E-S-P to service its customers and keep the machines from having "downtime"; (2) The making of parts totally unavailable to J-E-S-P, while selling the same parts to customers who are not identified as competitors of Kodak in the service area; (3) Kodak raising its already high prices to parts that it would sell to independent service dealers, by eliminating the 10% discount on non-rush orders; (4) Kodak contacting customers and attempting to prevent them from using third-party service by telling them that parts would not be available from Kodak for independent service companies and by refusing to sell parts on any basis for new machines.

18. Kodak for the entire 26 years I had been with them and up until 1986, had sold micrographics parts to meet the "needs of its equipment owners," and "to any party who intends to use them to repair Kodak equipment," according to published Terms of Sale. Prior to Kodak's policy change in 1986, J-E-S-P could normally expect delivery of non-rush orders within 14 days, and rush orders over night or within two working days. **Schedule A** attached hereto shows how this waiting period changed, almost overnight, with the wait for normal parts orders (initially stated to be up to 90 days for

some parts) moving to an average of approximately 35 days, and, more importantly, for urgently needed parts, the wait moving from two days to approximately 26 days.

19. Even more importantly, on the sale of parts critical to machines, (which are not "all time" parts manufactured on a one time basis for machines, but are parts which regularly wear out and are frequently reordered by Kodak) Kodak refused to sell such parts to independent service organizations competing with it.

20. For example, part No. 897452 represents a feed roller which is a critical and high usage part for a Model 450 microfilmer. On February 20, 1987 J-E-S-P issued Purchase Order 3873 for a quantity of four such feed rollers, part No. 897452. On March 13, 1987, Kodak sent an unsigned letter to J-E-S-P saying that these parts were no longer available to J-E-S-P. On March 31, 1987, J-E-S-P sent a letter to Kodak explaining to Kodak why such action put J-E-S-P in a precarious position and again requesting the parts. Finally, on May 29, 1987, Kodak sent J-E-S-P a certified letter allowing for J-E-S-P's resubmission of orders for these parts. The part was not received until 136 days after the order. At the same time, Kodak was selling the same equipment parts to parties who did not compete against Kodak in the service of micrographics equipment.

21. Kodak's new parts policy relies on Kodak's argument that its parts are not profitable and cannot produce a return on assets for its Parts' Services. This does not comport with the facts of which I have knowledge. For example, for equivalent parts, the N.B. Jackets Company manufactured their part No. 50445 and sold it

to the public at $143. Kodak sold the identical part as their part No. 9004314 at $340. ALOS's parent company manufactured and sold their part No. 23095 at $26.80, but Kodak sold the identical part as part No. 604315 at $77. Additionally, Kodak eliminated its 10% discount for non-rush parts, as to all "BENU's" J-E-S-P (as well as competitors). Nevertheless, since Kodak was the only source of supply for the vast majority of all the replacement parts for Kodak micrographics machines, J-E-S-P and other independent service companies had to buy these parts and paid the higher prices.

22. Kodak represented to me in May 1985 and in the months following that they would be taking steps to discontinue supplying parts to J-E-S-P for newer equipment, and for older equipment so as to promote their sales of new equipment, and prevent J-E-S-P's lower price/higher quality service from showing up Kodak. Randy Miller, the New York Sales Manager, telephoned me on May 3, 1985 and said that Kodak would discontinue supplying parts to J-E-S-P for newer equipment and would supply parts for older equipment until the stock was depleted. He told me on June 7, 1985 that J-E-S-P was making it difficult for Kodak to sell new equipment.

23. Contracts, both public and private, which J-E-S-P had acquired for the servicing of Kodak machines were endangered or lost from the Kodak parts policies. J-E-S-P had contracts with the State of New Jersey Purchasing Department. On July 30, 1987, Mr. Vallentine of the State of New Jersey Purchasing Department told me that failure to perform on State contracts could result in: (1) suspension of J-E-S-P from the bidder's list and prevention of J-E-S-P from being awarded State contracts for

a period of time to be decided by the Director of Purchases; (2) a decision by the State to have the remainder of J-E-S-P's contract assigned to another vendor with the costs billed to J-E-S-P; (3) exclusion of bidding privileges to J-E-S-P with certain county and city governments; and/or, (4) the payment of legal fees by J-E-S-P for legal work resulting from the non-performance.

24. Because of the Kodak parts problem J-E-S-P drastically diminished its solicitation of service contracts covering Kodak equipment owned by the State of New Jersey, as well as Kodak equipment owned by county and municipal governments who take advantage of the State of New Jersey's "Bidder's List" contracts.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 26th day of January, 1988, at East Brunswick, New Jersey.

/s/ John Damiani Jr.
John Damiani Jr.

EXHIBIT A

JESP

. . . the source for micrographics
microfilm equipment sales, service & supplies

Kodak responses to our parts purchases as of 7/20/87

JESP PO #	Date Ordered	Date Rec'd	*Waiting Period	Urgency Request
3084	08/28/86	09/08/86	11 days	RUSH
3115	09/10/86	10/15/86	35 days	Normal
3144	09/22/86	10/15/86	23 days	Normal
3171	09/02/86	09/25/86	23 days	RUSH
3106	09/09/86	10/14/86	35 days	RUSH
3095	09/04/86	10/15/86	41 days	Normal
3294	09/16/86	10/15/86	29 days	Normal
3163	09/22/86	10/15/86	23 days	Normal
3353	10/27/86	11/05/86	9 days	Normal
3459	11/19/86	12/10/86	21 days	Normal
3537	12/04/86	12/15/86	11 days	RUSH
3657	01/07/87	02/09/87	33 days	Normal
3557	12/11/86	01/13/87	33 days	RUSH
3684	01/13/87	01/19/87	6 days	RUSH
3751	01/28/87	02/12/87	15 days	RUSH
3782	02/04/87	02/26/87	22 days	Normal
3813	02/10/87	03/17/87	35 days	Normal
3814	02/10/87	03/17/87	35 days	Normal
3815	02/10/87	03/20/87	38 days	Normal
3843	02/13/87	03/17/87	32 days	RUSH
3861	02/24/87	never rec'd		Normal
3873	02/20/87	07/06/87	136 days	Normal
3968	03/12/87	03/25/87	13 days	Normal
3989	03/18/87	04/10/87	23 days	Normal

JESP PO #	Date Ordered	Date Rec'd	*Waiting Period	Urgency Request
4048	03/26/87	04/22/87	27 days	Normal
4051	03/27/87	04/20/87	24 days	Normal
4129	04/08/87	05/18/87	40 days	Normal
4152	04/10/87	05/14/87	34 days	RUSH
4179	04/15/87	05/14/87	29 days	Normal
4005	03/23/87	04/16/87	24 days	Normal
4371	05/01/87	05/14/87	13 days	Normal
4340	04/27/87	05/21/87	25 days	RUSH
4494	05/20/87	06/17/87	28 days	Normal
4626	06/09/87	07/06/87	27 days	Normal
4628	06/10/87	07/06/87	26 days	Normal
4503	05/20/87	06/16/87	27 days	Normal
4675	06/16/87	07/07/87	21 days	Normal
4681	06/17/87	07/06/87	19 days	Normal
4777	06/29/87	07/21/87	22 days	RUSH

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS **DECLARATION OF BRADLEY WELCH IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, BRADLEY WELCH, declare as follows:

1. The facts stated herein are known to me of my own personal knowledge except as stated, and, if called upon to testify to these facts, I could and would competently testify to them.

Background

2. I was President of B.C.S. Technical Services, Inc., a Colorado corporation. B.C.S. Technical Services provided leasing and servicing of microfilming equipment. Our technicians have over 19 years combined experience and specialize in the service of Kodak's Recordak, Reliant and other microfilm systems. We serviced the area in and around Denver, Colorado. I was formerly with CESD of

the Eastman Kodak Company as a Technical Resource Person. I was with Kodak from 1974 to 1986.

3. B.C.S., Inc. was the parent company of B.C.S. Technical Services, and also of B.C.S. Micrographics in Boston, Massachusetts. B.C.S. was started in January, 1986.

4. B.C.S., Inc. is owned by Vernon Hall. B.C.S., Inc. is one of the largest distributors of Kodak products in the United States. B.C.S., Inc. is a well-established broker and Kodak authorizeo processing lab.

Kodak Conspires To Put B.C.S. Out of Business

5. On May 26, 1987, Vernon Hall, owner of B.C.S., Inc. informed me that B.C.S., Inc. would have to dissolve B.C.S. Technical Services, because Kodak was enforcing a new policy which prohibited the independent service of Kodak micrographics equipment. He stated that he had been informed by Kodak that they did not want B.C.S. Technical Services, Inc. continuing the service of Kodak equipment. Because B.C.S., Inc. cannot afford to lose its status as a distributor of Kodak products, B.C.S. Technical Services had to be disbanded in 1987.

The Effect of Kodak's Parts Policy on B.C.S.

6. Up until the time that B.C.S. received the July 18, 1986 letter from Joseph O'Brien stating Kodak's new policy on micrographics parts, B.C.S. Technical Services had expanded rapidly its service of Kodak equipment.

7. When B.C.S. Technical Services was first founded, we made it clear to Kodak that we intended to go into the

third-party service business. We set up an account with Kodak for the resale of all items on a "non-taxable" basis. All parts were available at that time, on all Kodak micrographics equipment that we were maintaining.

8. Kodak's new policy in 1986 of refusing to sell parts at all to new equipment, and refusing to sell "all time" parts, as well as its delay in shipping parts caused our business substantial losses in customers and revenues; prevented us from expanding our business to offer a lower price, higher quality service to dozens of new customers that expressed an interest, but whom we could not service because of the parts restrictions. It prevented us from entering into the business of serving Kodak photocopy machines, since parts for these were totally unavailable from Kodak.

9. Kodak, in the past, applied a 10% discount on non-rush orders of micrographic parts. After the July 18, 1986 letter, and the September 1, 1986 deadline, this information, concerning the 10% discount, still appeared on the invoice, but was not available to B.C.S. Technical Services, as an independent service organization competing with Kodak. B.C.S. Technical Services would have been willing, and have expressed a willingness to pay to Kodak higher prices for parts if the parts were available on the same basis to all customers of Kodak. Kodak, however, told me directly that marketing motives, and not the price, profit, and return on parts, is the basis for their new policy.

10. After the July 18, 1986 O'Brien letter and the September 1, 1986 deadline, B.C.S., Inc. and B.C.S. Technical Services in Denver, because they were engaged in the

repair business, experienced substantial delays in their parts deliveries. However, B.C.S. Micrographics in Boston, which was solely a service bureau received parts immediately, since they were not identified as being in competition with Kodak in the repair business.

11. The restrictions on parts have taken on a number of forms. Some parts that were available in 1986 are no longer available at all to us as an independent service organization, but are available to other organizations such as B.C.S. Micrographics who are not engaged or identified as third-party service organizations.

12. On one parts order in 1986, Kodak delayed 30 days before letting B.C.S. Technical Services know that they would not send the part. This was a part that we had received freely in the past. Kodak's response to our inquiry as to the reason it would not ship this part to us was "this part has been ordered from our suppliers on a "all time" order basis. It is available only to Kodak personnel and customers who have purchased equipment directly from Kodak and who do their own service." This statement was clearly not true. I thereafter requested a customer of ours who bought used Kodak micrographics equipment to order the part. It was received by them in three days. This customer does not own, and did not purchase from Kodak the piece of equipment for which the part was ordered.

13. After Kodak changed their parts policy, I had a conversation with Kodak's Denver District Sales Manager, Jack Murray. Mr. Murray stated that Kodak had changed their parts policy in order to prevent used

equipment dealers from being able to repair and recondition used Kodak equipment. Mr. Murray stated that "if Kodak can prevent used equipment from being available, then customers would have to buy new equipment."

Kodak's Misrepresentations to B.C.S. Customers

14. In January, 1987, Mr. Murray told the Adams County Treasurer, William Sokol, that he should not turn his equipment maintenance over to B.C.S. Technical Services because we could not get parts from Kodak. Mr. Murray did not mention parts delays, but simply said that we could not get parts at all. B.C.S. Technical Services was willing to provide the micrographics repair services to Adams County, at a substantially discounted rate from that being offered by Kodak, and, to provide a higher quality service than that which Adams County had described it was experiencing from Kodak at the time.

15. On April 20, 1987 at 2:30 p.m., a Kodak sales representative, Thomas R. Hankens, told purchasing agent Lynette M. Maliespard of First Interstate Bank that they should not do business with B.C.S. Technical Services, because we could not get parts from Kodak, and that all parts we used to repair our equipment would be *used* parts.

16. Additionally, Kodak representatives have told Becky Martin of Super Valu Stores, Dennis Baumfalk of Bank Western, and Elizabeth Martin of Capital Life Insurance that B.C.S. could not obtain the parts necessary to service their equipment, and that they should not give their business to us.

Customers Locked In To Kodak

17. A number of accounts with which I am familiar have large investments in Kodak micrographics machines which are used in combination with computer output hardware and software specially tailored to their Kodak equipment. These include Metropolitan Life Insurance, American Express, Blue Cross/Blue Shield, Diners Club, Mountain Bell and United Bank of Denver.

18. Because of the large cost of the equipment and its low resale value, the specialization in the software, the investment in time and money in the training of their employees, these companies cannot, as a practical matter, and have not replaced their Kodak equipment with another brand even though Kodak has a monopoly on the service of this equipment since they refuse to sell parts to service this equipment to independent service organizations.

19. B.C.S. Technical Services has maintained and does maintain a large inventory of new parts from Kodak, and spends considerable sums every month to replenish this stock. All of our inventory was purchased directly from Kodak, and does not contain any used parts. B.C.S.'s substantial inventory of Kodak equipment and parts were used to film our own work, and the work of others as a microfilm service bureau. In fact, B.C.S. stocked micrographics equipment parts which represents about 15% of its total service revenues, and it takes B.C.S. almost three years to completely turn over its parts inventory. From my experience at Kodak, Kodak is able to "turn" their parts stock six times per year.

20. Through my experience at Kodak it was clear that Kodak regarded its parts sales in micrographics area as a highly profitable enterprise. A Kodak Equipment Service Representative was charged only 50% of the price that the same part was sold to an independent service company. With the elimination of the 10% discount to independent service companies, Kodak now gets 220% of the price charged to ESR when a part is sold to an independent service company.

Attempts to Purchase Parts From Kodak Suppliers

21. We have attempted on numerous occasions to buy parts from Kodak's manufacturers who supply them with replacement parts. We have been told directly by these manufacturers, such as Merkle Motor Company, and Bodine Electric Company, that they are not allowed to do business with us under the terms of their supply agreements with Kodak, or that they simply would refuse to sell Kodak parts to us based on their arrangement with Kodak.

22. B.C.S. Technical Services lost many private contracts above, a large federal government contract, and other private industry contracts as a result of the unavailability of parts, and parts restrictions.

Quality of Service and Price Competition

23. One of the primary reasons I began B.C.S. Technical Services was Kodak's policy of delaying service to Kodak micrographics owners who did not purchase a Kodak EMA. Customers of Kodak service on a "per call"

basis has an approximately three-day wait for Kodak service. Kodak management instructed its service personnel that they were to delay service and give lowest priority to such service because it was not as profitable for Kodak as their highly profitable EMA business.

24. B.C.S. offered both contact service and a 3-hour response time on per call customers for Kodak micrographics machines. This quality service response was the reason B.C.S. was able to obtain many customers from Kodak.

25. B.C.S.'s prices on service contracts were 20% lower than those of Kodak, and 35% less than Kodak on per call rates. This also was a substantial factor in B.C.S. taking business away from Kodak.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 28th day of January, 1988, at Denver, Colorado.

/s/ Bradley Welch
Bradley Welch

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(9)

No. 90-1029

Supreme Court, U.S.
FILED
JUL 31 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICRO-GRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, d/b/a G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, d/b/a MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; and CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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VOLUME III, PAGES 470-705

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Petition For Certiorari Filed December 20, 1990
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendants.	NO. C 87 1686 WWS **DECLARATION OF KIM TAMVACAKIS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, KIM TAMVACAKIS, declare as follows:

1. The facts stated herein are known to me of my own personal knowledge, except as so stated, and I could competently testify to them if called upon to testify.

Background

2. I am President of Atlanta General Microfilm Company, Incorporated, d/b/a Datek, Ltd. This company was originally started as a Kodak dealer in the late 1950's, selling Kodagraph brand microfilm equipment.

3. Atlanta General's business involves servicing, reconditioning, sales of equipment and supplies, brokering, and microfilming, solely in the area of micrographics.

4. Atlanta General employs a number of top technicians, qualified in micrographics and photocopy maintenance. Charles Cochran is a veteran of 30 years with the Eastman Kodak Company, with 22 years in micrographics equipment service and 8 years in photocopy repair service.

5. Our technicians, and Atlanta General spend considerable time and moneys through technical manuals, through training by other technicians, and, where available, through training by the companies which manufactured the machines.

6. Additionally, we order, and have always ordered and stocked well in advance, for our needs, the Kodak micrographics, and other micrographics parts which we use. Since Kodak's "parts action" in 1986, however, Kodak will greatly delay large orders for our inventory, although they have professed that they want us to stock inventories for our own needs.

7. Atlanta General Microfilm is involved primarily with Kodak micrographics equipment, but handles Minolta, Canon, Microsize and Microdesign machines and service as well.

Discrimination In The Application of Kodak's Micrographics Parts Policy

8. Immediately after the change in Kodak's micrographics parts policy announced in July 1986, Kodak

began instituting a number of policies which discriminated against Atlanta General, but favored companies that did not compete with Kodak directly in the micrographics service and used equipment area, or, companies who had substantial other business with Kodak.

9. The following discrimination has occurred:

9.1. On parallel orders, for the same micrographics parts from Kodak Parts Services, Atlanta General as a "BENU" (competitor) was told that the part was an "all time" part which could not be purchased from Kodak at all. At the same time, the same part was ordered by a non-BENU (non-competitor) and the part was immediately shipped by Kodak and received by the non-competitor. Attached hereto as ***Exhibit A*** are the identical orders, and Kodak's discriminatory response. This has occurred on several occasions.

9.2. Parts have been ordered by Atlanta General as a "BENU" (competitor) and Kodak has stated that these parts are "back-ordered" or will be delayed for some reason. The same order, placed through a non-BENU (non-competitor) has been shipped immediately by Kodak to the non-competitor. For example, our order no. 99B2792 was delayed by Kodak and took 41 days to arrive at Atlanta General on a non-rush basis. The same part, ordered the same day by another Georgia-based company on a non-rush basis was delivered by Kodak in two days.

9.3. Through the placement of over a dozen parallel orders, the pattern has remained exactly the same: delays or refusal to sell the parts to Atlanta General, who is a competitor of Kodak, but prompt delivery

to those who have not been blacklisted as Kodak competitors. Immediately after the July 18 announcement by Kodak of its replacement parts policy, "blacklisted" account delays ran approximately 41 days. The average time for Atlanta General to receive orders after they were "blacklisted" was 27 days. The average time for parallel orders put in on the same day, with the same parts order, and on the same non-rush basis was three days.

9.4. Kodak has eliminated the 10% discount for non-rush orders as to Atlanta General. Yet, for parties or companies not identified as Kodak competitors, and not self-servicers, or distinguished from Atlanta General except for their not competing head-to-head with Kodak in the service of micrographic machines or the used micrographics equipment business, the 10% discount is uniformly available. Parties from whom Kodak receives substantial dollar volume of business as film resellers or equipment resellers have, likewise, not been discriminated against in micrographics parts because of Kodak's financial interest in them. AMS, of Monroe, North Carolina, who has three locations as a Kodak reseller, in: Monroe, North Carolina; Jacksonville, Florida; and Daphne, Alabama, has not experienced the discrimination that Atlanta General Microfilm has because it is a substantial Kodak reseller. These resellers, however, will not supply parts to blacklisted ISOs, at least not with Kodak's knowledge. The same is true of service bureaus like Dataplex of Flora, Mississippi.

9.5. Micrographics replacement parts orders are being delayed now, as a result of Kodak's claiming they must be reviewed by "parts specialists." These have resulted in delays of up to six weeks on many parts

ordered by Atlanta General. Parts order by other entities, including parts ordered in the name of my dog, "Remy Corgi" have not experienced these delays, have been processed with a 10% discount for non-rush orders, and have not been refused because they were "all time" parts orders.

Refusal to Deal By Kodak Parts Suppliers

10. In an attempt to alleviate the parts problems created by Kodak's refusals to sell to Atlanta General Microfilm, I contacted Bodine Electric, a supplier of motors for Kodak micrographics equipment. Bodine Electric refused to sell me, on any terms and conditions, the high speed motor for a Kodak Prostar DVR processor. I am unable to obtain this part except through Kodak.

Atlanta General's Competition With Kodak

11. Atlanta General competes directly with the Eastman Kodak Company for the service of Kodak micrographics equipment in the area of service and maintenance of such equipment, and for the business of prospective owners of micrographics equipment who have chosen Kodak equipment through the sale of used and reconditioned micrographics equipment.

12. In the area of micrographics repair and maintenance, Atlanta General's prices are substantially lower than those of Kodak. For example, Atlanta General's service call for a simple malfunction taking approximately 15 minutes for a technician to locate the repair would be $45 ($15 for one-quarter hour plus a $30 call charge).

Kodak's same charge for the repair would be $175. Our service is on a greatly expedited basis for the outlying communities of Atlanta, and many customers have chosen us over Kodak on this basis. The price of our reconditioned equipment, for a Kodak Starvue reader-printer completely reconditioned with lens and console would be approximately $2,000. Kodak now sells its Starvue reader-printers, new for $6,509.

13. As a result of Kodak's restriction and discrimination in the sale of micrographics parts, Atlanta General has closed its branch office in Knoxville, Tennessee. In this area, there is no longer a micrographics independent service organization which can compete with Kodak for the service of Kodak micrographics equipment, nor a reconditioner who can offer reconditioned machines. The loss of volume from the branch office in Knoxville, Tennessee is approximately $100,000 per year.

14. Additionally, because of Kodak's replacement parts practices in the area of photocopy machines, Atlanta General has not gone into this business. This is so, even in light of the fact that Charles Cochran, with 8 years servicing experience in Kodak Ektaprint photocopy machines and training from Kodak, would be fully capable of allowing Atlanta General Microfilm to go into such business, and it is an area in which we could very favorably compete with Kodak.

15. Pat Kelly, who operated American Microfilm out of Mobile, Alabama, has gone out of business as a result of the increased pressures of Kodak for micrographics replacement parts.

16. I have been informed by Financial Suppliers, Inc. of Duluth, Georgia that they will no longer purchase Kodak equipment from our firm for resale and service by us because of our inability to get micrographics parts on an expedited basis. This is a loss of approximately $100,000 worth of Kodak business per year. The letter received from J. Richard Thompson, Chairman of the Board of Financial Suppliers, Inc. stating this is attached hereto as **Exhibit B.**

Competition For Independent Service of Other Micrographics Equipment

17. Financial Suppliers, Inc. of Duluth, Georgia, changed their purchase of equipment to Fuji. Fuji, as well as Minolta, Cannon, Microsize, Microdesign and certain other manufacturers allows free and open competition for the service of their equipment by independent service organizations. Micrographics equipment parts, manuals, training and necessary equipment for the repair of these manufacturers' micrographics equipment can be purchased by any independent service organizations for the servicing of this equipment, as a result, is at a much lower cost and higher quality than is the case where a manufacturer, such a Bell & Howell, provides only factory service or a single designated dealer for repair service in a territory.

18. The high cost of Kodak EMA's on micrographics equipment have allowed Atlanta General to acquire maintenance of such equipment in direct competition with Kodak on many of our existing accounts.

19. Butler Business Systems was a service bureau in Atlanta, Georgia, that owned a substantial amount of Kodak equipment and had never attempted to service any one else's equipment. It chose to have AGMC and other organizations service its machines, and purchased parts for AGMC to repair these machines. As a result, Kodak sent a letter in the spring of 1987 informing Butler it would not be under the same parts restrictions as independent service organizations. A copy of this letter is attached hereto as **Exhibit C.** This difficulty in obtaining parts and subsequent down time on cameras caused Butler extra expense for overtime and delays in satisfying delivery schedules. Tim Mordarski, President of Butler, was forced to close his business and cited Kodak's parts restrictions as a major contributing factor.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 29th day of January, 1988, at Atlanta Georgia.

/s/ Kim Tamvacakis
Kim Tamvacakis

BEST AVAILABLE COPY

REMS

REMITTANCE INVOICE

EASTMAN KODAK COMPANY | PARTS SERVICES | 800 LEE ROAD | ROCHESTER, N.Y. 1

BILL TO

• ATL GEN MICROFILM CO INC
3060 PHARR COURT
ATLANTA GA 30305

SHIP TO

• ATLANTA GEN MICROFLM CO
3060 PHARR CT.
ATLANTA GA 30305

U P S

D.U.N.S. NO. 00-220
E.I.N. NO. 16-0417

478

INVOICE DATE	INVOICE NO. • PS NO.		ORDER RCVD. DATE	DEALER NO.	CUST. ORDER NO.	PA
02-28-87	099319411	0795672	02-23-87	6966527	56138	

QUANTITY	PART NUMBER		UNIT PRICE	AMO
1	897452	ROLLER-DOC FEED	BACK ORDERED	
		THIS PART HAS BEEN ORDERED FROM OUR SUPPLIERS ON AN "ALL TIME" ORDER BASIS. IT IS AVAILABLE TO KODAK PERSONNEL AND CUSTOMERS WHO HAVE PURCHASED EQUIPMENT DIRECTLY FROM KODAK AND WHO DO THEIR OWN SERVICE.		
1	897456	ROLLER DISCHARGE	BACK ORDERED	
		THIS PART HAS BEEN ORDERED FROM OUR SUPPLIERS ON AN "ALL TIME" ORDER BASIS. IT IS AVAILABLE TO KODAK PERSONNEL AND CUSTOMERS WHO HAVE PURCHASED EQUIPMENT DIRECTLY FROM KODAK AND WHO DO THEIR OWN SERVICE.		

MAIL TO:

18

EXHIBIT A 01

PLEASE REFER TO TERMS OF SALE SHOWN ON REVERSE SIDE OF THIS FORM

* BACK ORDERED ITEMS WILL BE SHIPPED TO YOU AS SOON AS AVAILABLE.

SUB TOTAL	
SALES / USE TAX CODE	
TRANSPORTATION	
TOTAL	$

We certify that in our production of the goods covered by this invoice we have complied with all requirements of the Fair Labor Standards Act of 1938, as amended

REMIT TO

REMITTANCE INVOICE

EASTMAN KODAK COMPANY | PARTS SERVICES | 800 LEE ROAD | ROCHESTER, N.Y. 14650

BILL TO

AAA-MICRO INC.
ATTN-REMY
1795 RIVERSIDE ROAD

ROSWELL GA 30076

SHIP TO

AAA-MICRO INC.
ATTN-REMY
1795 RIVERSIDE ROAD

ROSWELL GA 30076

U P S

479

D.U.N.S. NO. 00-220-618
E.I.N. NO. 16-0417150

INVOICE DATE	INVOICE NO. - PS NO.		ORDER RCVD. DATE	DEALER NO.	CUST. ORDER NO.	PAGE
03-07-87	121352	0849656	~~03-05-87~~	0025505	5712A	

	QUANTITY	PART NUMBER			UNIT PRICE	AMOUNT
	1	897452	ROLLER-DOC FEED	BACK ORDERED*		
	1	897456	ROLLER DISCHARGE	T	106 00	106 00
				SUB TOTAL		106 00
			E-LESS 10% FOR ELIGIBLE NON-RUSH ORDER	PARTS		10 60
				SUB TOTAL		95 40
				SALES / USE TAX CODE 009		4 77
				TRANSPORTATION		1 95
				TOTAL $		102 12

MAIL TO:

"S .

EXHIBIT A 02 EORGIA E. LOCAL TAX 5%

T= TAXED

PLEASE REFER TO TERMS OF SALE SHOWN ON REVERSE SIDE OF THIS FORM

* BACK ORDERED ITEMS WILL BE SHIPPED TO YOU AS SOON AS AVAILABLE.

BEST AVAILABLE COPY

/OICE

EASTMAN KODAK COMPANY | PARTS SERVICES | 800 LEE ROAD | ROCHESTER, N.Y. 14650

BILL TO

• AAA-MICRO INC.
ATTN-REMY
1795 RIVERSIDE ROAD

ROSWELL GA 30076

SHIP TO

• AAA-MICRO INC.
ATIN-REMY
1795 RIVERSIDE ROAD

ROSWELL GA 30076

PARCEL POST

480

D.U.N.S. NO. 00-220-6183
E.I.N. NO. 16-0417150

ICE DATE	INVOICE NO. · PS NO.		ORDER RCVD. DATE	DEALER NO.	CUST. ORDER NO.	PAGE
-18-87	124787	0870848	03-17-87	0025585	5712A	1

QUANTITY	PART NUMBER			UNIT PRICE	AMOUNT
1	897452	ROLLER-DOC FEED	T	40 00	40 00
		BACK ORDER RELEASED			

STOCK

5020

SUB TOTAL		40 00
E-LESS 10% FOR ELIGIBLE NON-RUSH ORDER PARTS		4 00
SUB TOTAL		36 00
SALES / USE TAX CODE 009		1 80
TRANSPORTATION		98
TOTAL	$	38 78

MAIL TO:

GEORGIA & LOCAL TAX 5%

TAXED

EXHIBIT A 03

PLEASE REFER TO TERMS OF SALE SHOWN ON REVERSE SIDE OF THIS FORM

* BACK ORDERED ITEMS WILL BE SHIPPED TO YOU AS SOON AS AVAILABLE.

DATEK LTD. - ATLANTA MICROFILM
3060 PHARR COURT
ATLANTA, GEORGIA 30305
(404) 262-2135

Purchase Order

NO 05827

TO Kodak
Most of this order was shipped to BUTLER (see below)
ordered on 4/2/87

SHIP TO 3 inconsequential items were ordered via our blacklisted A.G.M.C. account (see below)
on 4/2/87

REQUISITION NO	P.O. DATE	DATE REQUIRED	SHIP VIA	F.O.B. POINT	TERMS
			Non rush		

QUANTITY ORDERED	QUANTITY RECEIVED	STOCK NUMBER / DESCRIPTION		UNIT PRICE	TOTAL AMOUNT
	BUTLER	"700"	**A.G.M.C.**		
8		897452 FEEDER ROLLER		$ 4/00	$ 32 00
20	10	189885 WASHER	10	07	1 40
10		086892 WASHER		25	2 50
50	30	187895 WASHER	20	15	7 50
5		164430 WASHER		25	1 25
4		614964 SEPERATING ROLLER		28 00	112 00
50	30	897600 WASHER	20	35	17 50

481

DATEK LTD. - ATLANTA MICROFILM
3060 PHARR COURT
ATLANTA, GEORGIA 30305
(404) 262-2135

Purchase Order

NO 05818

TO Kodak
(716) 724 7278
AAA GAle 3/27/87 control # 896 475
Hospital ? 3/31/87 # 901 272
A.G.M.C. 3/31/87 jay #

SHIP TO Datek
Dennis:
A few of the parts were called in on our a/c # 6966527 the rest go to AAA and Hospital Micro. None of the items going to the blacklisted AGMC account were on b/o

REQUISITION NO	P.O. DATE	DATE REQUIRED	SHIP VIA	F.O.B. POINT	TERMS
Datek	3/26/87	NON-RUSH ASAP	UPS		NET 30

QUANTITY ORDERED	QUANTITY RECEIVED	STOCK NUMBER / DESCRIPTION		UNIT PRICE	TOTAL AMOUNT
			Hoping AGMC	10¢	
30		232156 retaining CRIP RING / SIDE COVERS	√20 + (10)	√15	4 50
1		873089 STRIKER	√1	√60	60
5		121177 SETSCREW	√5	√25	1 25
1		876054 SPRING	√1	√1 25	1 25
18		873054 Roller	√10 (8)	2 50	~~45 00~~
2		873118 Knob B/O	√2	7 00	14 00
5		151790 PIN	√5	√35	1 75
16		873091 STOP	√8 (8)	√75	12 00

TOTAL

EXHIBIT A 04

BEST AVAILABLE COPY

EXHIBIT B

FINANCIAL SUPPLIERS, INC.
P.O. Box 338 • Duluth, Georgia 30136-0338
Phone: 404-476-1566

November 2, 1987

LOGO

Mr. Kim Tamvacakis
Atlanta General Microfilm Co., Inc.
3606 Pharr Court
Atlanta, Georgia 30305

Dear Kim:

It is hard to tell an old friend that you are going to quit doing business with him. As your records will show, during 1984-85-86, we purchased an average of $100,000.00 worth of Kodak equipment from your firm. These purchases were made with the understanding that you would repair and service the equipment in a timely manner. Starting in 1986-87 period, your service got worse and worse and your reasoning was that you could not get replacement parts for Kodak. Since this type of equipment must be repaired quickly, we had to stop selling equipment serviced by you.

We have since signed an agreement during the early part of 1987 with Fuji to sell and service their equipment.

If you are able to get your parts problems solved and can make timely repairs, we would consider doing business with you again. While you were able to get parts, your service was excellent.

Hope the facts don't hurt too much.

Yours very truly,

/s/ J Richard Thompson
J. Richard Thompson
Chairman of the Board

JRT/jg

EXHIBIT C

Butler Business Systems, Inc.
1440 Chattahoochee Ave., N.W.
Atlanta, Georgia 30318

Telephone (404)
351-2922

April 28, 1987

Dear Kim:

It is with great regret that I have to inform you that Butler Business will be no more. One of the many reasons for this is the Kodak policy for cutting off parts to us.

As you know, a service bureau whose equipment is mostly Kodak cannot survive against its competition who may be able to keep their machines running either because they are not Kodak, or because they are able to get parts.

The latest letter from Kodak informing us that our parts would be delayed 90 or more days was the final straw. It was indeed strange to get such a certified letter since we are *not an independent service* organization. We have never serviced any one else's equipment. In fact, your company

did most of the work on our cameras. Others who have worked on our cameras were James Tittle d/b/a Microtechnical and Gene Stowers d/b/a Microservice.

When your company was cut off by Kodak from obtaining next-day-air parts in September, 1986, we thought that we could circumvent this arbitrary policy by ordering the parts ourselves. During the past 12 months, we have had twelve orders from Kodak. All of these parts were used in our cameras, except for the one set of belts that you purchased from us for use on your own service bureau cameras.

Accordingly, please note that I am selling the assets of the business to Bell & Howell Records Management for what I consider to be below market.

It would not be fair to say that Kodak's new parts policy was the only reason that I closed down Butler Business. It was a major contribution though.

When I purchased Butler Business Systems in November, 1981, it had already logged over 12 years as a successful Remington Rand Microfilm service bureau. We were progressing very well on obtaining new customers and growing beyond startup projections.

[REDACTED]

There are always factors which affect business, but the difficulty in obtaining parts was not planned. The down time on cameras caused us extra expense for overtime and delays in satisfying delivery schedules.

The microfilm service business is a difficult and close margined business. The small service bureaus need all the

support you can offer. They are the backbone of micrographics in the United States.

Sincerely,

/s/ Tom Mordarski
Tom Mordarski

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220 Sansome Street, Fourteenth Floor
San Francisco, California 94104
(415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS **DECLARATION OF KENNETH W. KASTNER IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, KENNETH W. KASTNER, declare as follows:

1. The facts herein are known to me of my own personal knowledge, except as so stated, and if called to testify I could and would competently testify to these facts.

Background

2. I am the President of AMTech Equipment Maintenance, Inc., which has its principal offices in St. Paul, Minnesota. I was an employee with the Eastman Kodak Company for 15 years, as an equipment service representative specializing in the repair of Kodak micrographics equipment. I left Kodak to enter the independent service business on January 18, 1985.

3. AMTech is engaged in reconditioning and servicing micrographics equipment, specializing primarily in Kodak equipment. We service a broad range of Kodak microfilmers and accessories, processors, readers and reader-printers. Ninety percent of our business is Kodak business.

4. Our clientele include both people in the private and public sectors. In the private sector we service numerous banks and savings and loans, corporations, and service bureaus who microfilm for third parties. In the public sector we service the Internal Revenue Service, the United States Veterans Administration, and county subdivisions of the State of Minnesota, including Hennepin and Ramsey Counties.

Customers Locked In To Kodak

5. In connection with my fourteen years at Kodak, and through my present business of reconditioning, servicing and selling micrographics equipment to customers, I have discussed with these customers their micrographics equipment needs, operations, and economics of purchasing new or additional equipment.

6. With regard to older Kodak equipment, and particularly with regard to the newer Kodak equipment, the special applications, film and coding, and economic factors require Kodak micrographics customers to continue to have and maintain their Kodak equipment. For example, Super Valu Stores, located in Eden Prairie, Minnesota had an old Kodak Miracode system, with two machines to read their relatively old film. Despite the high cost of Kodak service for these machines, Super Valu could not

afford to trade these machines in or replace them with new machines since they were the only machines that could read and retrieve the old film with years of records. AMTech has maintained these machines for Super Valu Stores, even after Kodak had declared the machines obsolete.

7. Super Valu Stores, as well, has two Oracle cameras and five Oracle retrieval devices. They have about eight to ten years of invoices on this film. Because no other machines can serve the function of the Oracles, and it would be impossible from a cost standpoint to redo the eight to ten years of filmed invoices for Super Valu Stores, they are locked in to these Oracle machines. AMTech has provided maintenance for these at a substantially lower price than Kodak was offering for such a service. The Kodak per call on this Oracle equipment would be about $80 travel time and $80/hour, with a minimum of one hour, plus parts. Additionally Kodak customers that do not have an EMA service contract must wait eight hours minimum for service whether or not ESR's are available. AMTech services this equipment on a per call basis, with no required wait for $35 travel time and $50/hour which is billed to the nearest 1/10 of hour.

8. On more sophisticated equipment, such as the Kodak equipment in place at State Farm Insurance, Blue Cross and Blue Shield of Minnesota, and Burlington Northern Railway, more sophisticated systems involving IMT 250's or 350's, and Reliant 2000 equipment have computer applications and software producing a similar effect to that of the Super Valu Stores' situation that the application's software, and computer output is not readily compatible with other manufacturer's equipment.

These customers are locked in to their Kodak equipment, and Kodak service. AMTech is unable to provide competitive service for these customers because Kodak's new policy of refusing to allow parts for the newer equipment has kept us from competitive bidding on these accounts.

Kodak's Discrimination Against AMTech on Parts

9. As of September 1, 1986 AMTech has been identified as a Kodak service competitor. We have not received the customary 10% discount for non-rush orders. We have been refused emergency overnight service.

10. When an order is placed the Kodak representative, when rush orders are placed, upon asking for AMTech's customer number, has stated "let me get someone to review your order – your order will be reviewed by a parts planner." These orders are usually very substantially delayed. For example, on May 8, 1987 I placed an order for Kodak Part No. 569759 on a rush basis. The order was referred to a parts planner. The order was not received until June 5, 1987 via Airborne Courier. However, on an identical order placed by ABACI, Inc. on May 8, 1987, for the identical part, the order was received from Kodak on the next day, May 9, 1987.

11. A number of companies, who are service bureaus, but who do not compete, as AMTech does, head-to-head with Kodak for contracts in the public sector and in the private sector have received parts from Kodak on Kodak's usual terms without the type of discrimination described above. These companies include ABACI, Inc., National Business Systems, and Innovative Micrographics.

12. Kodak, further, has represented to our customers and potential customers that we would be unable to get parts from Kodak and satisfy our service contracts. This was represented to Harlan Peterson at ABACI, Inc.

13. As to a small number of smaller parts used in the repair and service of Kodak micrographics equipment, AMTech has been able to purchase these from retail sources who acquired them from the manufacturers who manufacture for Kodak. We have experienced that the price at which Kodak Parts Services resells the parts is 50 to 60% higher than even the retail sources from which we obtain our parts. For example, General Electric manufactures a micrographics lamp no. 1152. This is sold to a retail company, Bulb Man. Bulb Man's price on this item was $2.90. Kodak charged $6.00 for the same item.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 27 day of January, 1988, at St. Paul, Minnesota.

/s/ Ken Kastner
Ken Kastner

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS **DECLARATION OF STEPHEN M. SEARLE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, STEVE SEARLE, declare as follows:

1. The facts stated herein are known to me of my own personal knowledge except as so stated, and I could competently testify to them if called upon to testify.

Background

2. I am the President of Searle Enterprises, Inc., d/b/a Micro Image. Our company is located in Spring, Texas and serves the Southern Texas area.

3. We repair and service Kodak Micrographics equipment, including Kodak Reliant 450, 550, 600, 700, 750 and 800 microfilmers, Kodak Oracle microfilmers and retrieval units, Kodak Starvue readers and reader/

printers, Kodak Starfiche reader/printers, Kodak MRGI and MRD2 microfilmers, Versamat processor, Kodak Prostar processors, Kodak RP1 and 2 microfilmers and Kodak Rotoline microfilmers. Approximately 90% of our business is in Kodak equipment. In addition to service and repair, we sell and lease reconditioned Kodak equipment.

4. Our total revenues for the fiscal year ending September 30, 1986 were $315,759.91. Our revenues from Kodak micrographics machines, which had expanded in every year from 1984 through 1986, did not increase in 1987 because of Kodak's actions.

5. Micro Image began business on August 25, 1984. Prior to starting business we contacted the Eastman Kodak Company Customer Parts Service Department in Rochester, New York and informed them that we were starting up a business as an independent service company specializing in servicing Kodak equipment. We were told that we could order parts from them, and there would be no problem. We were told that we would be able to obtain all parts on either a routine or rush basis. This was confirmed in the replacement parts principles and the terms of sale which Kodak sent us which stated that Kodak would sell micrographics parts to meet "the needs of its equipment owners" and would provide them "to any party who intends to use them to repair Kodak equipment."

6. Our customers are banks, private industry, and some governmental agencies, including Allied Bank, First Bank and Trust, Interfirst Bank, Pennzoil Company, Bechtel, Incorporated, Dow Chemical Company, Mitchell

Energy, Union Texas Petroleum, Mobil Oil, and Harris County Clerk's Office (Houston).

7. On all of these accounts, we have competed directly with Eastman Kodak Company in offering service for micrographics equipment. Our services are offered at substantial discounts below the published prices of the Eastman Kodak Company, and the quality of our service, according to our customers, has been superior to that they receive from Kodak. For example, our prices for an annual maintenance contract on a Kodak Starvue reader/printer, and on Oracle terminals were set at 20% below Kodak's prices in 1984. Since that time, Kodak has had at least two price increases in its annual maintenance contracts, which were not followed by Micro Image. Kodak's prices are now approximately 30-40% higher than ours.

Kodak Replacement Parts Policies and Discrimination Against Micro Image

8. We received a letter from Kodak on August 5, 1986, from Joseph O'Brien, informing us that as of September 1, 1986 Kodak's new replacement parts policies and practices for micrographics equipment would go into effect, and that we would not be able to order parts from them without incurring a waiting period, and that we would no longer be eligible for any discounts. On September 3, 1986, we placed a rush order with Kodak and were informed that it would take up to 90 days to receive this part where as similar orders had been delivered before in one day. On September 5, 1986, I placed a

routine order with Kodak and was informed that it would take 90 days to receive these parts.

9. We maintain a computer printout showing parts ordered by our company from the Eastman Kodak Company from June 25, 1986 through the present. This, together with the invoices we received from Kodak show a number of elements of Kodak's policies designed to put independent Kodak micrographics equipment suppliers out of business. These acts have included the following.

9.1. Kodak has instituted substantial delays on our parts orders whereas non-competitors of Kodak get overnight delivery. Kodak, in this regard, has attempted to cover up the actual delays, by post-dating the invoices to the date of the release and shipping of the order, not the date the customer actually placed the order. This practice has been in place only for all orders since September 1, 1986. The delays in parts and response to routine orders in September 1986 went from a normal response time of 10 days to 39 days.

9.2. Crucial parts were singled out by Kodak, and the delays on the crucial parts increased by Kodak, seemingly without regard to whether those parts were items that were easily ordered and stocked by Kodak. These critical parts are the ones which it is most important for Micro Image to receive on a prompt basis, so that their customers' machines are not out of service.

9.3 Kodak has made statements to a number of our customers, including Craig Wright, of Union Texas Petroleum, about limiting parts to Micro Image. When Craig Wright contacted Kodak about purchasing an Oracle microfilmer and retrieval unit from Kodak he was told

that it would not be wise to buy the older equipment, because the parts would not be available in the future to service it. Kodak tried to sell him a new Reliant 2000 microfilmer unit instead. When Craig Wright asked whether Micro Image would be able to get parts for this machine, she was told that Micro Image could only purchase parts if they had purchased parts from Kodak in the past. But, when she asked if Kodak would put this into writing before she bought the machine, Kodak refused to do so. They would not assure her that Micro Image could purchase parts even if they had purchased them in the past.

10. During this period from September 1986 to the present while Micro-Image, as a competitor of Kodak, had its parts severely limited, my wife's English china shop, The China Hutch, was able to order micrographics parts with any restrictions.

11. The China Hutch had never dealt with Kodak before, had never purchased or owned any micrographics equipment for Kodak, or anyone, and, was not in the business of micrographics.

Customers Lost Due to Kodak's Restrictive Parts Policy

12. Micro Image has lost a number of customers because of their concern with Micro Image's ability to obtain parts, since Kodak's change in micrographics parts practice and policy in September 1986. We have lost the business of Allied Bank of Texas in Houston, Texas since we were unable to obtain the parts from Kodak to service the new Kodak machine that they obtained. Coastal Corporation of Houston, Texas said that they would not take

out a contract with Micro Image, again, because they were concerned that we could not get overnight parts.

13. The volume of business actually lost, and business which we might have obtained, had we been able to assure parts for the service of the Kodak micrographics equipment, would be approximately $30,000 for business lost, and approximately $100,000 for business which we might have obtained.

14. In Houston, it was our experience that customers were extremely upset with Kodak service because the technicians from Kodak were unable to service all types of their Kodak micrographics equipment, and they would have to get several different Kodak technicians for different machines. We offered technicians who were proficient in all machines, and could have expanded almost at will, but for parts.

Kodak OEM Parts Sources Not Available

15. In an attempt to obtain parts which Kodak would not sell us, I contacted the Pittman Company in Pennsylvania. We were told that the motors made by this company could not be purchased by anyone else except Kodak since the parts were made specifically for Kodak and they could not sell them to anybody else.

16. I also contacted Guardian Electric Company to obtain parts which we were having difficulty obtaining from Kodak. Guardian Electric, no matter what quantity of parts I ordered, quoted me a price more than double what Kodak's *resale* price to me was.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 30 day of January, 1988, at Spring, Texas.

/s/ S M Searle
STEPHEN M. SEARLE

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS **DECLARATION OF JAMES M. ANDERSON IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, JAMES M. ANDERSON, declare as follows:

1. The facts stated herein are known to me of my own personal knowledge, except as so stated, and, if called upon to testify to these facts, I could and would competently testify thereto.

Background

2. I am President of Advanced Systems Services, Inc., which is a Colorado corporation having its principal place of business in Denver, Colorado. We have two offices, one in Denver, Colorado, and one in Colorado Springs, Colorado. We have been in business approximately six years and do over $300,000 in gross annual

volume. We are engaged in the sales and service of micrographic equipment and supplies and over one-third of our business is in Kodak equipment and supplies.

3. Our customers for service include the Federal government, State and city government entities, hospitals, pharmacies, banking institutions, insurance companies, title companies, real estate agencies, law firms and libraries.

4. We service a wide variety of Kodak cameras, processors and reader-printers including the Kodak Reliant 450 through 800, Recordak, Starfile, Starvue, IMT 50 – 450, Prostar I and II, Kodak Versamet and Kodak MRK.

Technicians and Parts

5. The technicians in our independent third-party service center are highly skilled in the service of this equipment. We compete directly with Kodak for our customers, and have bid against Kodak and obtained the following customers: City and County of Denver, State of Colorado, Lowery Air Force Base, Bureau of Reclamation, NOAA, and Bureau of Land Management.

6. Our parts are ordered directly from the Eastman Kodak Company central parts service, and have been ordered as such for the six years that we have done independent service on Kodak micrographics equipment. This was in reliance on Kodak's policy, stated in its parts policy that they would supply parts to all persons for the service of Kodak machines.

Kodak's Restriction on Parts

7. On September 5, 1986, at 8:00 a.m. Denver time, we placed an order to Kodak for certain micrographics parts needed for the independent servicing of Kodak micrographics equipment. These were not "all time" parts but were parts that regularly wear out on Kodak machines. Kodak's agent, Sue Kimmal, took the order and stated that she was willing to ship it rush. Thereafter, upon requesting our dealer number, she referred to a notice, and said that the parts could not be shipped until a later date, and that the rush order would not be honored.

8. When we inquired as to what the problem was, we were told by Ms. Kimmal that someone else would have to call us back within the hour. We waited until 3:00 p.m. Denver time and called Kodak Central Parts Service in Rochester, New York, again being told that someone would call us back immediately.

9. It was not until the following Monday that we received a call from Joseph O'Brien, the author of the July 15, 1986 letter, whose first statement was "Tell me exactly what your company does." Mr. O'Brien was quite rude during the balance of the conversation and kept insisting that he had to know what our company did and that we had received a registered letter regarding the "year old" policy that Kodak had regarding parts shipments. We requested a copy of the signed return receipt for the letter that was sent to us and were told that it could not be located. The address to which Kodak had sent it was the old address from which we had moved some time before and the letter had apparently never reached us.

10. Mr. O'Brien then told us that the parts would not be shipped for 90 days, even though the parts were in stock, but that the order that we placed on the 5th would be shipped in that 90 day period. We returned our call to Ms. Kimmal at Central Parts Service and were told that the order was no longer in effect, that the order would have to be replaced. Kodak assured us that Joseph O'Brien would call me regarding the mixup in the order. No such call was every received. Attached here to as **Exhibit A** is a letter of September 9, 1986 which we received from Joseph O'Brien, confirming our telephone conversation.

Business Foreclosed

11. As a result of Kodak's policy and practice changes in September 1986, Advanced Systems has lost numerous customers, including: Sunstrand Company, who employs Kodak because independent service cannot get service information and parts on newer equipment; and, the Colorado Student Loan Program, Denver, Colorado, to whom Kodak represented that Advanced Systems would be unable to provide service for their machines because of parts. Advanced Systems has been unable to bid for or secure others in competition with Kodak. The volume of such business which was lost as a result of Kodak's parts action would amount to in excess of $250,000.

12. While Advanced Systems has been unable to get Kodak parts on a reasonable basis, other companies, who did not purchase Kodak machines directly from Kodak have ordered and received parts just as before July 1986.

These companies differ from Advanced Systems only in that they order large amounts of film and supplies from Kodak, and are not in high-profile competition with Kodak in service. These companies include Datafilms, Inc., American MicroData, Datacorp, Dakota Graphics, Quality Records and X-L Micro Systems.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 26 day of January, 1988, at Denver, Colorado.

/s/ James Anderson
James Anderson

EXHIBIT A

[KODAK LOGO]

September 9, 1986

Advanced Systems Services, Inc.
1525 West Bayaud
Denver, CO 80223

Attn: Mrs. Pam Anderson

Dear Mrs. Anderson:

This will acknowledge and respond to our telephone conversation on September 8, 1986.

I regret that there was a delay in your receiving my letter on Kodak's parts practice. However, that delay does not affect the substance of our current business practice which has been in the process of implementation for more than a year.

I have included as an attachment another copy of the letter.

Sincerely,

/s/ Joseph M. O'Brien
Joseph M. O'Brien
Business Imaging Systems

JMO/bjb

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al.,	)	NO. C 87 1686 WWS
Plaintiffs,	)	**DECLARATION OF MICHAEL ARNOLD IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
vs.	)	
EASTMAN KODAK COMPANY,	)	
Defendant.	)	

I, MICHAEL ARNOLD, declare as follows:

1. The facts herein are known to me of my own personal knowledge, except as so stated, and if called to testify I could and would competently testify to these facts.

Background

2. I am the president of CPO, Limited, a California corporation engaged in the business of servicing and repairing Kodak photocopy machines, reconditioning used Kodak photocopy machines, and selling used Kodak photocopy machines. I also sell used Xerox and IBM copiers and duplicators.

3. I have been engaged in the used Kodak copier industry, first with one of the founding companies of the industry, Equipment Brokers Unlimited, and then with my own company, CPO, Limited since 1984.

4. Through the purchase and sale of machines from all sources, including individual auctions, liquidations, leasing companies, corporations, governmental entities, I have become familiar with the market values of used Kodak, Xerox and IBM machines.

Competition With Kodak – Used Machines

5. In purchasing used machines for reconditioning or resale, CPO Limited competes directly with the Eastman Kodak Company who buys such machines or takes them as trade-ins on new machines. Attached hereto as **Exhibit A** are true copies of the Kodak trade-in schedules for July 1986 and January 1987 for the trade in of Kodak copier-duplicators to Kodak copier-duplicators. Attached hereto as **Exhibit B** are true copies of the Xerox Trade-In Allowance Schedule for July 1986, and for December 1986 for used Xerox copier-duplicator products being traded in for new Xerox copier-duplicator products.

The Used Machine Market

6. These schedules show, for the trade in of comparable machines that, the older a Xerox machine model became, generally, the less the machine was worth in trade. The same is not true for Kodak machines. For example, on the trade in of comparable models of Xerox, a Model 1075 for a Model 1090, the trade in price during

this period dropped from $18,000 to $13,000. With Kodak, for comparable models, a 150 traded in for a 250, the trade in price for this period rose from $10,000 to $18,000.

7. During this period, the used value of a Kodak Ektaprint 150 has dropped from $10,000 down to a range of approximately $2,500 – $3,500. So, for a machine that is worth approximately $2,500 on the used market, in January 1987, Kodak was paying $18,000.

8. A precipitous drop in the value of used Kodak machines in the 1986-1987 period has been caused by: 1) Kodak's refusal to sell replacement parts to third-party service organizations, the vigorous enforcement of that practice, attempts to cut off all supplies of parts; and, 2) Kodak's arbitrary practices with regard to the acceptance of Ektaprint machines for Kodak service, including arbitrary and unreasonable inspection and certification fees, unwarranted reconditioning fees and requirements, and arbitrary refusal to do anything at all with broken equipment.

Kodak's Anticompetitive Actions

9. For example, Tim Koester, who is the District Service Manager for San Jose, has, for some time, up until 1987 inspected used machines, and, within reasonable limits, put machines on Kodak equipment service agreements after they were reconditioned. This was due to the fact that our equipment service representative, John Elle, had 23 years experience as a Kodak equipment service representative, and is one of the best in the business. Machines reconditioned by John Elle are, from our experience, among the best reconditioned machines in the

country, including those reconditioned by Kodak's own reconditioning centers. In 1987, however, after John Elle had reconditioned a Kodak 85, a Kodak equipment service representative went through the reconditioned machine and stated that it would cost approximately $6,000 to bring the machine up to standard. Among the items cited was the requirement for a new photocopying drum. This drum was had earlier been tested with Kodak testing apparatus, and exceeded all of Kodak's specifications and standards for an existing drum, and, in fact, did not need replacement.

10. When I questioned Tim Koester about the radical change in Kodak's policy, I was told words to the effect that "I'm under pressures now that I wasn't under before."

11. Additionally, with regard to Kodak authorized parts, packed, shipped and sold by Kodak to entities from whom CPO acquired them, Kodak has now refused to allow any of these parts to be installed on Kodak's machines. We have been told by the Kodak service representatives and Tim Koester words to the effect that the origin of the parts is questionable so they cannot be put in a Kodak machine. This was said despite the fact that the parts were clearly wrapped, labeled and marked as genuine Kodak parts which had not been opened or taken out of their original wrappings.

12. Kodak, in July 1985 instituted a "pre-installation inspection fee," and a requirement that machines be reconditioned prior to being put on a Kodak Equipment Maintentance Agreement ("EMA"). This policy, and the requirement that these machines be reconditioned, while

impeding the sale of used Kodak equipment, and lowering its value slightly, did not account for the precipitous drop in the value of used Kodak equipment which has occurred in 1986 and 1987.

13. However, through a series of steps, Kodak has increasingly tightened or made impossible the pre-installation inspection/reconditioning/parts requirements which have had the effect of making our business more and more difficult to operate. These steps are set out below.

14. The "pre-installation inspection fee," which was required by Kodak before any used equipment (even if Kodak had serviced it for its entire life) could be serviced by Kodak, was raised precipitously in January, 1987. For example, the cost of the pre-installation inspection fee for a 150 copier/duplicator went from $250 (which was supposed to, and does cover the cost to Kodak of this inspection) to $1,500.

15. Thereafter, Kodak closed down reconditioning shops, including the reconditioning shop in Whittier, California (which was moved to Mexico), leaving no reconditioning shops I am aware of except the one located in Rochester, New York.

16. As the price of used Kodak copier/duplicator machines became lower and lower, so that used equipment brokers could buy the machines and still pay a remanufacturing fee (with transportation) of $7,500 or larger, Kodak added language that "remanufacturing for equipment not purchased directly from Kodak is available at the sole discretion of Kodak." (Exhibit C, p. 20)

17. This language is now being used by Kodak to refuse to remanufacture machines, so that, despite the low price of used equipment, Kodak can still refuse altogether, and without any basis, to remanufacture a machine or service it.

18. In one instance of which I am aware, on one brokered Kodak 250AF for which service was applied from Kodak, Kodak first said that it could go on service if it were reconditioned (even though the machine was only about four years old and had been totally maintained by Kodak), then when Kodak was told to go ahead and recondition it and put it on service, Kodak refused to do so, based on the recent policy change.

19. Further, although one may buy a Kodak reconditioned machine (sold by Kodak for the new machine price), with a guarantee of service from Kodak for seven years plus an additional seven years with a yearly inspection, brokers are discriminated against where the *same* remanufactured machine, also remanufactured by Kodak, is being sold by them. In the case of brokers like CPO there is no seven year guaranteed service, with an additional seven years on a yearly inspection for machines, although remanufactured by Kodak, if that machine was not purchased *directly from Kodak*, but was purchased from an equipment broker – even though Kodak did the remanufacturing of that machine.

Kodak "Security" Agents

20. Kodak has applied pressures, through its "security agents," to prevent the flow of copier parts to companies like CPO. In November 1987, Mr. William

Kennedy came to my offices in San Jose and introduced himself as a "security agent from Kodak." He demanded that I produce for him records on a Kodak 85 copy machine. This machine had been purchased by Shawn Repco of Excel, Inc., from the Xerox Corporation, who acquired it as a trade in on a Xerox machine. I purchased this machine from Mr. Repco and resold it to the Copy Shoppe in Whittier, California. The Kodak security agent, nevertheless, implied that the machine was stolen. The machine had been delivered and put into service with the Copy Shoppe in June 1987. After the call by the Kodak "security agent," and although Kodak had serviced this machine for six months on a "per call" basis with only two service calls, Kodak called the Copy Shoppe in Whittier, California and demanded that they pay for an Equipment Maintenance Agreement, in arrears, for the six month period between June 1987 and December 1987.

Supply of Used Machines

21. Kodak has further attempted to "gather up" and keep off the market used copier machines by a number of practices. United States Leasing Company and Citicorp Leasing used to be able to sell machines into the used market after their leases expired. Kodak has now required them to give Kodak a first right of refusal to repurchase those machines when they come off the lease. That right of first refusal, if not exercised by Kodak, allows the leasing company to sell the machines on the open market. However, with the depressed used Kodak copier equipment prices on the open market, the leasing companies we have dealt with have had little choice but to resell to Kodak, or trade in these machines. Kodak

either reconditions these machines (often selling them as new machines), or scraps them.

22. Kodak has bid against used equipment brokers, and thereafter scrapped numerous machines that came onto the open market. After the end of a lease of approximately 40 Kodak machines the RCA Corporation wanted to sell these machines. In particular, 33 150P Ektaprint copiers were purchased, after Kodak bid thousands of dollars above the market price for each copier. I am informed that these copiers were not reconditioned, but were junked to keep them off the used copier market.

23. The direct effect on our business of Kodak's parts, inspection, reconditioning, service and used equipment policies has been to dry up the sale market for used equipment, to those few entities still left who can find parts and independent service for the machines, or who can obtain parts themselves and service the machines themselves. Despite the fact that the Kodak Ektaprint copier machine population has greatly increased over the past two years, the supply of used Ektaprint copiers has decreased due to Kodak's policies.

Kodak's Statements Regarding CPO's Service And Parts

24. Kodak representatives have repeatedly engaged in misinformation regarding CPO, its parts and service, to try to dissuade our customers from purchasing CPO's brokered Kodak's Ektaprint equipment or service for that equipment. The following incidents have occured or been reported by CPO representatives.

25. In July 1986 a Kodak representative stated to Mary Evans of Drexler Technology that COP's equipment could only by antiquated, with no update or retrofit possible and was probably a lemon. They said that CPO, Ltd. could not provide any parts or support for the equipment. All of these statements were untrue.

26. In August 1986, Kodak told Jim Hill of San Jose State University that they would not service any equipment which was purchased from CPO, Ltd. They later changed this and said it would be very expensive to put under service, even though the unit had been under full Kodak service prior to that time. After San Jose State University cut the purchase order to CPO, Ltd. Kodak said they would have matched CPO, Ltd.'s price, even though after one and a half years of marketing this account they have never offered a unit at this same price.

27. In August 1986, Kodak told Coleen Burke of San Jose University that they would match any bid submitted by CPO, Ltd. – even though Kodak cannot do this, since it is under a GSA contract with the university and must submit GSA pricing only.

28. In December 1986 Kodak represented to Trude Cevallos of Systems Industries that Systems, which rented two Kodak 150F's, was locked in to its contract with Kodak, and that CPO's machines were lemons and she would be unable to get parts or service for these machines. Ms. Cevallos was upset and wrote to Kodak complaining about the rude and unethical behavior of the Kodak representatives.

29. In January, 1987 Kodak representatives told Sandy Chiarzvalle of Berlinger, Cohen & Biagini that

even if Kodak were to service brokered Ektaprint copiers, the service would be more expensive than if the machine were purchased from Kodak. Kodak also, contrary to its stated policy said that they would refuse to provide training with service contracts if the equipment were brokered. They said that any unit sold by CPO was probably a lemon.

30. In October, 1986 Kodak was bidding against Pan American World Airways for the sale of copiers to Pan American. Kodak's pricing was $7,000 higher per machine than CPO's. Kodak reduced their bid, after being given an opportunity by Pan American, to $2,000 higher that CPO's. After Pan American cut the purchase order to CPO, Ltd., Kodak stated that our equipment was unreliable equipment and that Pan Am was taking a high risk – even though the equipment was currently covered under a Kodak Equipment Maintenace Agreement. Kodak charged Pan American double for each machine for the free installation kits, and engaged in a series of delays in inspecting and providing maintenance for these machines.

Other Pressures on CPO Customers

31. CPO bid against Kodak for the supplying of five Ektaprint machines to Photo-Drive-Up copy shops. CPO's prices for these machines were lower than Kodak's for comparable machines. Photo Drive Up had already been qualified by Citicorp to finance the purchase of these Ektaprint machines. However, when Photo Drive Up chose CPO as their vendor, after initially agreeing to complete the financing, Citicorp, through pressure from

Kodak, refused to do so because of their pre-existing relationship with Kodak.

Kodak's Maintenance Costs Are Higher Than In the Xerox Competitive Market

32. Whereas Kodak has a virtual monopoly on the service of Ektaprint copiers, there being fewer than ten servicers in the whole country, there is fierce competition from ISOs for Xerox copier service, since parts are available to all servicers for Xerox machines. Attached hereto as **Exhibit C** is a copy of the February 1, 1987 Kodak Ektaprint Copy Products Price Schedule. Under this schedule, the yearly maintenance for a 150AF Ektaprint copiers for Kodak Service would be $28,968 (based on 100,000 copies). The same service for a comparable Xerox 1075 is about $9,800.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 24th day of January, 1988, at San Francisco, California.

/s/ Michael Arnold
Michael Arnold

* * *

[Exhibits A, B and C to Declaration of Michael Arnold are lodged separately with the Clerk.]

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS **DECLARATION OF RONALD M. VARING IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, RONALD M. VARING, declare as follows:

1. The facts stated herein are known to me of my own personal knowledge, except as so stated, and if called to testify, I could and would competently testify thereto.

Background

2. I am the owner of International Business Equipment, a business involved in the brokering and servicing of high speed duplicators. IBE is located in Santa Fe Springs, California. We provide sales and service for Kodak Ektaprint Models 100, 150, 200, 225, and 250. We provide sales and service, as well, for the Xerox 9000 series, 1075, 1090 and 8200, as well as the IBM III 60.

3. Our primary customers are large users of Kodak machines including copying shops, quick print shops, and major accounts.

4. I have engaged in the purchase and sale of used photocopy equipment from all sources, including individual auctions, liquidations, leasing companies, corporations, and governmental entities since 1986. I began service of Kodak Ektaprint copiers in 1986. I am aware of only three other servicers of KOdak Ektaprint copiers in the United States. I am familiar with the market values of used Kodak, Xerox and IBM machines, and the service markets for these machines.

Kodak's Attempts To Eliminate Service And Brokering of Ektaprint Machines

5. Prior to the implementation of Kodak's recent practices on Ektaprint photocopy machines, including refusal to sell parts to independent service organizations, stopping of all parts sources, increasing the cost of Kodak service for used machines, and making reconditioning difficult or impossible, Kodak had stated to me that this process was underway and the purpose of this process – to put us out of the used Kodak Ektaprint machine business.

6. In October 1986 at the Graphic Expo East in Philadelphia, Pennsylvania, I spoke with Mitchell J. Bendar, from the Copy Products Division of Kodak. Mr. Bendar was the Manager of the commercial print market, which handled sales of Kodak Ektaprint copiers to the copy shop market – who are large buyers of such equipment

from Kodak. Mr. Bendar stated that the brokers, including IBE were doing way too much business, and that it affected his bottom line. He said that Kodak would be taking action to put us out of the Kodak business.

7. Subsequently, at the Graphics of America exhibit in Miami, Florida in January 1987, Mr. Bendar again stated words to the effect that "I told you not to mess with us," that "what Kodak is doing is lighter than I wanted," and "don't mess with us, sell used Xerox machines."

8. Kodak's steps to cut off parts for Kodak machines have included strongarm tactics by Kodak's "security" forces. I had been purchasing Kodak parts from a company in Chicago, the James Jones Company. This company had come to my attention as a result of an advertisement I ran for Kodak Ektaprint copier service in the Los Angeles area in a publication called "Quick Print."

9. The James Jones Company represented that they had a stock of parts for servicing Kodak Ektaprint copiers in the Chicago area. They were closing down their business, but had a stock of parts available for sale, and could buy and order parts from the Eastman Kodak Company. I purchased orders of parts from James Jones Company which I asked Capital Leasing of Chicago to take delivery on and trans-ship to me, since James Jones did not want to pay for shipping out of the Chicago area, but wanted the parts C.O.D. Chicago.

10. On Friday, December 11, 1987, I received a call from the President of Capital Leasing of Chicago. A "William Kennedy" representing himself to be from

Kodak's "security" forces in Rochester was at Capital Leasing's offices. I spoke with Mr. Kennedy on the telephone. He stated that he was investigating the movement of stolen Kodak parts through Capital Leasing. He said that the parts were "unauthorized" and that Capital Leasing was guilty of "receiving and transporting stolen parts." He further stated that the FBI would be involved. He demanded to know the persons I was buying the parts from and obtain copies of the checks for those parts. Mr. Kennedy, without any legal process or authorization, confiscated eight boxes of Kodak Ektaprint parts. Kodak has made no response or explanation of this incident, although I have inquired, through my counsel, as to their authority for the confiscation of these parts. I have had no contact from the FBI.

11. Mr. Kennedy demanded that I disclose all information concerning my purchases to him and provide him with the paperwork and copies of checks for the parts. He stated that he would be coming to California to collect these. Mr. Kennedy never came. All of the parts in question were paid for in full, at a fair market value for the parts. I have no reason to believe that these parts were "stolen," and no proof has been provided me.

12. Kodak's institution of the new policies on preinstallation inspection fees have greatly impeded the ability of brokers to sell used Kodak Ektaprint equipment, and greatly reduced the value of this equipment.

13. Kodak's sales people and service people have told me that their instructions from Rochester are to charge as high a price as possible for inspection fees and

for reconditioning as a means of squeezing out used equipment brokers for Ektaprint equipment.

14. The initial cost of a pre-installation inspection fee, for example, for a 150 copier/duplicator was initially set at $250. This amount was easily sufficient to cover the cost to Kodak for the time and materials of this inspection. The raising of the fee to $1,500 as of February 1, 1987 was what Mr. Bendar referred to in January 1987 through his warning "not to mess with us."

15. In closing down its Ektaprint reconditioning center in Whittier, Kodak took direct steps to prevent me from acquiring their service technicians to assist in servicing and reconditioning Kodak Ektaprint copiers. Employees from the Whittier reconditioning plant who interviewed with me before the closing were threatened by Kodak with immediate firing, or the withholding of medical benefits. Ron DeMarco, a Kodak personnel agent, admitted that he had called IBE pretending to be from Citicorp, to determine if Kodak's personnel were considering working for IBE.

Competition Between IBE And Kodak

16. In purchasing used machines for reconditioning or resale, and in servicing machines, IBE competes directly with the Eastman Kodak Company. IBE is virtually the only servicer in the United States, except for Northern and Southern California, who buys such machines or takes machines as trade in on new machines. Kodak, as the prices on the open market for used Kodak Ektaprint copiers have dropped, has anomalously, raised its trade-in prices. This is not the case with Xerox and

IBM machines. The market value of Kodak Ektaprint copiers over the past two years, as a result of Kodak's actions, have dropped to less than one-fifth of their prior value, for comparable machines of comparable age.

17. This drop in used price for Kodak Ektaprint copiers, combined with Kodak's high trade in value for Ektaprint copiers if traded in on new Kodak equipment, has made used photocopy machines extremely scarce in the marketplace. Kodak Ektaprint copy machine owners, despite the high cost of Kodak service, are retaining their machines.

18. Also, as the price of Kodak used machines has dropped, Kodak has instituted a series of steps, in addition to the pre-installation inspection fee, making it more and more difficult to acquire service on a brokered copier. The closing down of the reconditioning centers around the country has greatly increased the cost of reconditioning. Kodak has now even stated that it will recondition machines only at its "discretion." Under this policy, Kodak has refused to recondition machines, even where these machines have been under Kodak maintenance for their entire life.

19. Whether with the pre-installation inspection fee, or reconditioning policies, if a machine is brokered, Kodak has been discriminating against this machine and making it as expensive as possible to get on to Kodak service, or refusing to do it at all.

20. As a result of Kodak's policies, Kodak Ektaprint copier machine owners are locked in to Kodak's machines, unless they wish to take a substantial capital loss on those machines. This is shown by the fact that the

used Kodak machine market has dried up, despite the fact that there are more and more Kodak Ektaprint machines in use than ever before. IBE has, as a result, seen an increasing loss of sales through the inability to purchase used machines (which are simply not on the market); and the inability to obtain reconditioning and service for brokered machines, (or the high cost of doing so). IBE's Kodak Ektaprint used machine business has decreased in revenues from approximately $600,000 in 1986 to approximately $100,000 in 1987.

21. The Kodak used copier market is in stark contrast to the IBM and Xerox markets. While the Kodak market has undergone substantial changes in the past two years, no such changes have occurred in the used markets for IBM and Xerox. IBM and Xerox allow for independent service of their photocopy machines, and for the purchase of parts by independent copy repair services. The IBM and Xerox photocopy repair markets have been very competitive as to price and quality, which the Kodak market has not been, because of Kodak's restrictive parts/servicing/reconditioning policies.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 26th day of January, 1988, at Santa Fe Springs, California.

/s/ Ron Varing
Ron Varing

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS **DECLARATION OF JAMES A. HENNEFER IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, JAMES A. HENNEFER, declare as follows:

1. I am familiar with the facts herein of my own personal knowledge, except as stated, and if sworn could competently testify thereto.

2. I am an attorney licensed to practice law before all courts of the states of California and New York and before the Federal District Court for the Northern District of California, Southern District of New York, the Ninth Circuit Court of Appeals and the Second Circuit Court of Appeals.

3. I have been engaged for fourteen years in representation of clients in the area of antitrust and unfair competition matters in the federal and state courts. I am counsel for the plaintiffs herein.

4. Attached hereto as **Exhibit A** is a true and correct copy of the United States Department of Justice "Merger Guidelines", dated June 14, 1984.

5. This action was filed on April 14, 1987. Plaintiffs are 18 business located throughout the United States. Plaintiffs engaged, in part, in the service and repair of Kodak micrographics equipment and Kodak Ektamate photocopiers. These companies are mostly small business organizations, and are located in 10 states including California, Colorado, Georgia, Illinois, Minnesota, Missouri, New Jersey, New York, Pennsylvania and Texas.

6. Plaintiffs are loosely organized in an organization called MESDA ("Micrographics Equipment and Service Dealers Association"). The association, immediately after the filing of the complaint, during the summery of 1987 was engaged in organization, funding, the processing additional members of that service Kodak equipment who wished to have their claims heard in this action. Discovery was not initiated immediately, pending the admission of additional MESDA members and amendment of the Complaint to include their claims.

7. A verbal request was made of counsel for defendant Kodak as to whether plaintiffs would be allowed to be added to an amended complaint without need for a motion on or about September 1, 1987.

8. Prior to plaintiffs initiating discovery in this action, on August 14, 1987, defendant Kodak brought this motion for summary judgment, based upon facts that Kodak states "are as the Complaint describes them" (with relatively minor corrections).

9. Plaintiffs, as set court in their Memorandum of Points and Authorities and declarations, disagree that the policies of Kodak and their intent was not anticompetitive, and that their effects did not injure consumers of plaintiffs' services, and plaintiffs themselves.

10. At the first status conference in this case, held on September 11, 1986, the Court continued defendant's motion for summary judgment to allow plaintiffs to conduct the following discovery: 1) One set of interrogatories (with a suggested limit of 25 interrogatories); 2) one set of request for production of documents (with a suggested limit of 25 requests); and, 3) four depositions of persons with knowledge pertaining to summary judgment issues. Except for leave of Court, the plaintiffs were not allowed to take additional discovery. This order regarding discovery was filed September 18, 1987.

11. Plaintiffs elected, because of the limited number of depositions allowed, to take depositions of Kodak employees with knowledge in the areas of the declarations filed in support of the summary judgment motions. Plaintiffs expressed, verbally, and in writing, that depositions of additional Kodak personnel, and customers in the marketplace might be necessary to the defense of the summary judgment if declarations could not be obtained from these people.

12. On December 9, 10 and 11, 1987 the depositions of Emmett A. Gross, Edward Ince, and Lynn Brockmann Gleason, Kodak employees, were taken in Rochester, New York, and were allotted one day each. In two of these depositions, those of Mr. Gross and Ms. Gleason, the witnesses repeatedly required questions to be reread, and did not understand many of the issues and subject matters covered. Examples are set out in Exhibit G and I hereto.

13. On December 21, 1987, after counsel for plaintiffs and defendant were unable to reach agreement as to further discovery, including additional depositions, additional requests for production of documents, and a motion to compel documents in eight areas as to which documents had been refused to be produced by Kodak altogether, a status conference was held with the Court by telephone at defendant's request.

14. In this status conference, plaintiffs' counsel requested the right to bring a motion for leave of the court to pursue further discovery, and to compel responses to requests for production of documents. The Court stated that it would not entertain such a motion. Attached hereto as **Exhibit B** is the request for the Court to include this ruling in its order.

15. The Court, in response to plaintiffs' request for additional depositions ruled that "no more than two additional deponents" could be deposed, which deponents were required to "provide testimony regarding the issue of market power raised in defendant's motion for summary judgment." The Court further ruled, that any additional discovery should be addressed pursuant to

Rule 56(f) of the Federal Rules of Civil Procedure. The Court's order was filed January 4, 1988.

16. On January 11, and January 12, 1988, the depositions of John A. Lacy and Jeffrey L. Bradley, Kodak employees were taken at Rochester, New York. Mr. Bradley, upon deposition, had limited knowledge with regard to many issues and subject areas required for defense of the summary judgment motion. Examples are set out in Exhibit K hereto.

17. This case, as set out in Plaintiffs' Memorandum of Points and Authorities, covers a two very broad markets with very complex interrelationships between plaintiffs, defendant, third-party alleged co-conspirators and customers. It is nationwide in scope, and covers a multitude of products in a number of product groups, including, new and used Kodak Ektaprint copiers, new and used Kodak micrographics equipment, Kodak replacement parts for micrographics and Ektaprint photocopy equipment, and Kodak and independent service for Kodak micrographics and Ektaprint copiers.

18. Plaintiffs, as a result of the limited discovery allowed by the Court, have been unable to address, except through declarations of themselves and other ISOs, many of the important issues in the marketplace with regard to: 1) relevant market; 2) market power; and 3) competitive injury.

19. Because of the economic pressure Kodak exerts in the marketplace, particularly with regard to customers who are or may become dependent on Kodak's service, persons who could not be deposed, because of the limited scope of depositions allowed by the Court, were reticent

to or refused to discuss the case with plaintiffs' counsel, or, after discussing it, would not sign declarations which they acknowledged to plaintiffs were accurate. Attached here to as **Exhibit C,** and **Exhibit D** are drafts of such declarations of Paul Gilbertson and Frances Hurley, which they declined to sign for these reasons.

20. Additionally, and for the same reasons, some of the statements set out in the declarations opposing this motion for summary judgment by the declarants are not on personal knowledge, but, if depositions were allowed beyond the five authorized by the Court, could be established on the personal knowledge of deponents.

21. On each of the factual issues raised in the Memorandum of Points and Authorities, specifically set out in the Memorandum of Points and Authorities at the "INTRODUCTION" Sections I A through E, II A through B; and in the "STATEMENT OF FACTS at IA thorugh C, IIA and through C, and, IIIA through C, plaintiffs, if given the opportunity to continue discovery, could establish through further depositions of Kodak personnel, requests for production of subpoenas of outside parties and their documents, each of the facts stated therein. With the limited scope of discovery allowed, and the complex realities of the marketplace, it has not been possible to do so.

22. Plaintiffs' request, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, that they be given the opportunity to obtain such further discovery. The relevance of these issues, pursuant to the Court's order of

January 4, 1988, is stated in detail in Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion For Summary Judgment.

23. On June 3, 1985, I attended the deposition of J. Raymond Sutcliffe. Mr. Sutcliffe was duly sworn by the Court Reporter and asked questions and answered those questions. Attached hereto as **Exhibit E** are true and correct copies of excerpts from a certified copy of Mr. Sutcliffe's deposition transcript.

24. On June 3, 1985, I attended the deposition of John A. Lacey. Mr. Lacey was sworn by the Court Reporter, and was asked questions and answered those questions. Attached hereto as **Exhibit F** is a true and correct copy of the excerpts from a certified copy of Mr. Lacey's deposition transcript.

25. On December 8, 1987 I attended the deposition of Emmett A. Gross. Mr. Gross was duly sworn by the Court Reporter, was asked questions and answered those questions. Attached hereto as **Exhibit G** is a true and correct copy of excerpts from a certified copy of Mr. Gross' deposition transcript.

26. On December 9, 1987, I attended the deposition of Edward V. Ince. Mr. Ince was duly sworn by the Court Reporter, was asked questions and answered those questions. Attached hereto as **Exhibit H** is a true and correct copy of the excerpts from a certified copy of Mr. Ince's deposition transcript.

27. On December 10, 1987, I attended the deposition of Lynn M. Gleason. Ms. Gleason was duly sworn by the Court Reporter, was asked questions and answered those

questions. Attached hereto as **Exhibit I** is a true and correct copy of excerpts from a certified copy of Ms. Gleason's deposition transcript.

28. On January 11, 1988, I attended the deposition of John A. Lacy. Mr. Lacy was duly sworn by the Court Reporter, was asked questions and answered those questions. Attached hereto as **Exhibit J** is a true and correct copy of excerpts from a certified copy of Mr. Lacy's deposition transcript.

29. On January 12, 1988, I attended the deposition of Jeffrey L. Bradley. Mr. Bradley was duly sworn by the Court Reporter, was asked questions and answered those questions. Attached hereto as **Exhibit K** is a true and correct copy of excerpts from a certified copy of Mr. Bradley's deposition transcript.

30. Attached hereto as **Exhibit L** are documents produced by the Eastman Kodak Company, from the business records of the Eastman Kodak Company, kept in the ordinary course of business, bearing numbers inscribed by them for purposes of the document production, and produced to plaintiffs in response to Plaintiffs' First Request For Production of Documents filed with the Court on September 28, 1987.

31. I have caused to be reviewed the documents produced by the Eastman Kodak Company as documents numbers 2375 through 2902, a "Listing of Items Purchased for CESD in the Last 18 Months" together with related documents, and it appears that approximately 90% of such parts are purchased from outside sources and not internally produced by Kodak.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30 day of January, 1988, at San Francisco, California.

/s/ James A. Hennefer
JAMES A. HENNEFER

EXHIBIT B

LAW OFFICES OF
JAMES A. HENNEFER
220 SANSOME STREET
FOURTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
(415) 421-6100

December 30, 1987

HAND-DELIVERED

Alfred C. Pfeiffer, Jr., Esq.
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, California 94111

Re: *Image Technical Services, Inc., et al. v. Eastman Kodak Co.*, United States District Court, Northern District of California Action No. C 87-1686 WWS
Our File No. 1001.01

Deal Al:

We are in receipt of your letter of December 29, 1987 and the amended and proposed order memorializing the

December 21, 1987 telephone conference before Judge Schwarzer in the above-noted case.

With regard to paragraph number 3 of the proposed order, your understanding is correct, that the identification of the source, author and date of documents, where ascertainable, will only be with regard to a discrete number of documents specifically identified by plaintiffs, and not to identification of all documents *en masse*.

With regard to our proposed paragraph number 4 for the order, we do not agree that it is 'an inappropriate addition to the order.' I specifically requested permission of the Court to file a motion and to brief the issues of additional discovery and of compelling further responses to discovery already initiated. The Court ruled that such a motion should not be filed, but that the matters which might be contained in the proposed motion should be handled pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. I do not disagree that paragraph 5 addresses a portion of the Court's ruling, but believe the order to be incomplete with regard to the Court's ruling on the motion for discovery.

To assure that my conduct is not construed as a waiver, I must decline to agree to your proposed form of order as amended and must submit the enclosed form of order which more completely and accurately reflects the rulings of Judge Schwarzer on December 21, 1987 by adding the proposed paragraph number 4. The enclosed order, except for paragraph 4, is identical to the form of order attached to your letter of December 29, 1987.

I would request that both orders be submitted to Judge Schwarzer together with the copy of this letter which is enclosed.

Sincerely,

/s/ James A. Hennefer
James A. Hennefer

JAH:er
Enclosure

cc: Hon. William W. Schwarzer

EXHIBIT B

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS **ORDER** (PROPOSED)

A conference was held in this matter by telephone on December 21, 1987 at 3:30 p.m., at which time counsel for

the parties were heard regarding possible further discovery necessary for the plaintiffs to respond to defendant Eastman Kodak Company's pending motion for summary judgment. Having heard the arguments of the parties and good cause appearing therefor, the Court hereby ORDERS:

1. The revised briefing schedule on defendant's motion for summary judgment shall be as follows:

a. Plaintiffs shall file their response to defendant's motion on or before January 29, 1988;

b. Defendant shall file its reply brief on or before February 12, 1988;

c. The hearing will take place on February 26, 1988, at 11:00 a.m.

2. Without altering the above-described briefing schedule, plaintiffs shall be given the opportunity to take the depositions of no more than two additional dependents who can provide testimony regarding the issue of market power raised in defendant's motion for summary judgment.

3. Without altering the above-described briefing schedule, defendant will, upon specific requests by plaintiffs, provide plaintiffs with the source, author and/or date, if ascertainable, of any documents already produced to plaintiffs by defendants.

4. The Court will not entertain any motion by plaintiffs to compel discovery already noticed or for further discovery prior to their response to defendant's motion for summary judgment.

5. In connection with their response to defendant's motion for summary judgment, plaintiffs may move this Court, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, for the opportunity to obtain further discovery relevant to the issues raised by and material to defendant's summary judgment motion. Any request for additional discovery should be accompanied by an explanation of the relevance of the requested information to the issues raised by the material to defendant's motion for summary judgment.

IT IS SO ORDERED.

Dated:

WILLIAM W. SCHWARZER
Judge, United States District Court

Approved as to form:

For Plaintiffs:

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By: /s/ James A. Hennefer
James A. Hennefer

McCUTCHEN, DOYLE, BROWN & ENERSEN
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EXHIBIT C

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS **DECLARATION OF PAUL GILBERTSON IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, PAUL GILBERTSON, declare as follows:

1. I am Director of Computer Science Corporation in Sacramento, California.

2. Computer Science Corporation is in the business of claims processing for health and dental benefits for governmental entities. We have contracts with the State of California, State of Washington, and State of Colorado to process health and dental benefits administered by the State.

3. In connection with our processing of claims, we use record keeping devices which include a combination

of micrographics machines and computer output hardware and software tailored to our needs.

4. Our equipment includes the following Kodak equipment: 98 IMT 150 Microimage terminals; two Prostar processors, two Starfische reader-printers and two 750 intelligent control microfilm units.

5. The Eastman Kodak Company serviced all of our micrographics equipment up until March 1986.

6. CSC decided to move away from Kodak services because of the prices being offered by ITS were much more attractive, and because ITS agreed to provide more expeditious services, including having an in-house service representative.

7. In 1986 when ITS competed directly with Kodak for our maintenance contracts, Kodak was charging us over $200,000 per annum for the maintenance. ITS made a proposal to us to service the same contract for approximately $150,000. Kodak then lowered its price to approximately $150,000 per annum, and ITS lowered its price to approximately $120,000. After more negotiation, Kodak lowered its price to approximately $135,000, and ITS bid, and received the contract for maintaining all of our Kodak equipment for just over $100,000 per annum.

8. Without ITS as an independent micrographics service organization, CSC would have paid over $200,000 to Kodak for the servicing of our micrographic equipment. Moreover, Kodak demanded that payment for its service contracts be made up front, and ITS agreed to allow quarterly payments for the yearly maintenance contract.

9. ITS service has offered a quality of service and response time far superior to that of the Kodak service. ITS put an in-house service representative at CSC, and the response time and service on our equipment has improved substantially. ITS has an extra machine to replace machines that are down at CSC, or to take assemblies out and replace those assemblies in our units to assure that the machines can be back in service quickly.

10. When the ITS contract for maintenance of our machines began, we had three micrographics machines that had not been working for six months under Kodak maintenance and service. The ITS representative found the problems and had these machines operating in approximately two weeks.

11. CSC, because of the combination of machines, software used, and applications for that software, and the capital invested in our machines and in the training of our employees, could not possibly switch from Kodak machines to another brand. We are totally dependent upon the Kodak machines, because the replacement of the special applications which we have prevents us, as a practical matter, and as a financial matter, from switching to any other variety of micrographics machines.

12. Without ITS, and independent third-party service, even if Kodak were to charge $200,000 or 10 or 20 percent above that, we would be forced to pay the price for the maintenance of its equipment, because we cannot switch to another manufacturer's equipment.

13. In 1987, I went to the Eastman Kodak Company in Rochester, New York, for an introduction of new products. At a break in one of the meetings, in the hallway, outside the meeting, three or four Kodak personnel,

including Jack Lacy, were talking in the hall. I was asked why CSC went to third-party services. I told him that it was a matter of lower price, and better service from ITS than I was able to get from Kodak. I was told by Jack Lacy words to the effect that it "doesn't make any difference because we're going to have third-party service by the balls because of the replacement parts." The Kodak people in that conversation clearly stated that Kodak would be putting the independent service organizations out of the business of repairing micrographics equipment.

14. As a result of this, I returned to Sacramento and expressed my concern to ITS as to whether they would have any problems getting parts. This was of substantial concern to me because of the critical nature of our receiving continued service for our machines.

15. Because Kodak has control of the replacement parts for micrographic machines, and because of the possible problems with third-party service, ITS has to provide a price substantially lower than that of Kodak in order to be attractive to CSC in repairing its machines.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ___ day of January, 1988, at Sacramento, California.

/s/ _____
PAUL GILBERTSON

EXHIBIT D

LAW OFFICES OF JAMES A. HENNEFER
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE, INC., et al., Plaintiffs, vs. EASTMAN KODAK COMPANY, Defendant.	NO. C 87 1686 WWS **DECLARATION OF FRANCES HURLEY IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, FRANCES HURLEY, declare as follows:

1. I have acted as the Purchasing Agent for Commercial Trust Company, a bank with 27 branches throughout the State of New Jersey, with its principal offices located at 15 Exchange Place, Jersey City, New Jersey.

2. I acted as Purchasing Agent for Commercial Trust Company for ___ years, from _____ to _____. In such capacity, I had direct responsibility for the purchasing of goods, supplies, equipment and equipment service for the headquarters and various branches of Commercial Trust Company. In such capacity, I dealt directly with

representatives of major equipment manufacturers, supply manufacturers, distributors, and independent organizations supplying equipment service.

3. As the Purchasing Agent for Commercial Trust Company, it was my responsibility to obtain the highest quality equipment and service for that equipment at the most competitive prices.

4. To assist in the records keeping, Commercial Trust Company employees a micrographic system, microfilming records, processing that microfilm, and retrieving it with reader-printers. For the purpose of retrieving the information, Commercial Trust Company has 30 Recordaks, one in each of its 27 branches, and three in different departments in the principal office in Jersey City, New Jersey.

5. These Recordak machines represented a large capital investment. To change them would be a major expense. There would also be difficulties in changing the machines, because there are different microfilm formats, different operator requirements, and replacement of these machines with other brands might create problems in obtaining the service from a single source.

6. Commercial Trust Company employed the service of the Eastman Kodak Company through its equipment service representatives for the 30 Kodak Recordak machines until 1981.

7. J-E-S-P, a company with its principal offices in East Brunswick, New Jersey bid on our service contract in 1982. We switched from Kodak to J-E-S-P in 1982 and cut our maintenance costs for the Kodak Recordak machines

in half. J-E-S-P Company has provided Commercial Trust with excellent service from 1982 through the present on all of the Kodak Recordak machines.

8. Because it was critical to Commercial Trust that the Kodak Recordak micrographic retrieval machines in each of the 27 branches and three departments of Commercial Trust operate at all times, it required that the service be prompt, and that there be as little down time as possible.

9. Had J-E-S-P been unable to provide parts and service on a timely basis because of an inability to get parts from the Eastman Kodak Company in a timely fashion, Commercial would have had to cancel the J-E-S-P contract and had to obtain service from Eastman Kodak Company directly. (This would be even more true were J-E-S-P to have been unable to get parts at all from Kodak.) The service of Commercial's Recordak machines would have been required even if the costs of such service were substantially higher that J.E.S.P.'s costs or Kodak's former costs, because of the importance of keeping these machines in operation, and the costs and difficulty in changing machines.

10. Commercial Trust Company considered the purchase of new reader-printer machines to replace the Kodak Recordak machines in 1986. The purchase of new Kodak machines will received special consideration because of the Kodak name, the compatibility of the microfilm with Kodak reader-printers, the familiarity of the operators with Kodak equipment, the availability of service, and the position Kodak occupies in the micrographics field.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ___ day of January, 1988, at Jersey City, New Jersey.

FRANCES HURLEY

EXHIBIT E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FAR WEST MICROGRAPHIX, INC., Plaintiff, – against – EASTMAN KODAK COMPANY, Defendant.	CIV. S-83-371MLS

CONFIDENTIAL
Pursuant to Protective Order

DEPOSITION UPON ORAL EXAMINATION OF:
J. Raymond Sutcliffe

LOCATION:	Rochester Plaza, Suite 553 Rochester, New York 14614
DATE:	June 3, 1985
TIME:	1:04 p.m.

REPORTED BY: MARIA A. WOLCZYK, C.S.R., R.P.R.
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 25] J. RAYMOND SUTCLIFFE – DX BY MR. HENNEFER

A. It was brought to my attention that 3M paper was being used in our Reader-Printers, and there was some discussion about the fit of that product in our equipment and its performance.

Q. Let me ask you a few background questions here.

A. Yes.

Q. How do you interface, how does the BIS interface with the Service Division?

A. CESD?

Q. Yes.

A. Well, it is a separate division of the company, responsible to service and maintain the equipment sold by and manufactured by Eastman Kodak Company for all divisions of the company.

Q. Yes.

A. And as one of the divisions, as soon as its equipment is sold, they are responsible for servicing and maintaining that equipment on our behalf.

Q. When a new line of equipment came out, for example, when the Kodak Reader-Printer in the series of

the – the Starvue, Oracle, IMT came out, did you develop or did CESD develop a new group of [p. 26] technical people for that specific purpose, for servicing those?

A. No, not as such.

Q. What occurred?

A. They would train many of their present service people who maintain the micrographic, the microfilmers and other associated products on the new IMT Reader-Printers and may well have added to the number of service representatives, based on our projected sales of that equipment to the customers.

Q. BSMD and BIS then interfaced with CESD –

A. Yes.

Q. – in planning the product?

A. Yes.

Q. In planning the service; is that correct?

A. Yes.

Q. And the overall marketing –

A. No.

Q. They didn't, okay. Marketing strategy?

A. No.

MR. PICKETT: Let's have better questions. The question "marketing strategy," I object to the form of that.

MR. HENNEFER: Okay.

[p. 27] Q. Let me ask you this. In the Reader-Printer field, CESD had contracts after the warranty on your

products, service contracts, maintenance contracts after the warranty on your product wore out, is that correct, or expired?

A. Expired, yes.

Q. And –

THE WITNESS: May I object to his term in use of "wore out"?

MR. PICKETT: Absolutely.

MR. HENNEFER: It's inspired as the ultimate wearing out, I guess, ceased to exist.

Q. In 1977, approximately what percentage of the Kodak machines were handled by Kodak service people and CESD, in the Reader-Printer area I'm talking about specifically?

A. Rephrase the question again, please.

Q. What percentage of the machines, of the micrographics machines, Reader-Printers, were handled by CESD Kodak service warranties, service contracts after the warranties wore out in 1977?

A. Oh, I would estimate that somewhere between 75 and 80 percent of the customers would exercise the option to place the Reader-Printers [p. 28] under an equipment performance plan.

Q. With Kodak?

A. With Kodak, yes.

Q. And those that did not, who would service those machines?

A. Either the customer or presumably Kodak on a per call basis.

Q. And what additional percentage would Kodak handle on a per call basis of those machines, is what I'm asking you?

A. The balance.

Q. Pretty much the balance?

A. Yes, as far as I know.

Q. What you are saying is very few customers service their own machines?

A. Yes.

Q. So Kodak, through CESD, serviced approximately 100 percent of their own machines?

A. In 1979 through 1982.

Q. They did?

A. Yes.

Q. When did you first become aware of Far West as a plaintiff in this lawsuit?

MR. ROMEYN: As plaintiff?

* * *

EXHIBIT F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FAR WEST MICROGRAPHIX, INC., Plaintiff, – against – EASTMAN KODAK COMPANY, Defendant.	CIV. S-83-371MLS

CONFIDENTIAL
Pursuant to Protective Order

DEPOSITION UPON ORAL EXAMINATION OF:
John A. Lacy

LOCATION: Rochester Plaza, Suite 553
Rochester, New York 14614

DATE: June 3, 1985

TIME: 10:03 a.m.

REPORTED BY: MARIA A. WOLCZYK, C.S.R., R.P.R.
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

• • •

[p. 58] JOHN A. LACY – DX BY MR. HENNEFER

difference in terms of the insensitivity.

MR. HENNEFER: Historical. I'm not asking this year.

MR. PICKETT: Okay, fine.

A. I don't remember the specific numbers for each year.

Q. Was it based on total sales?

A. That's one measure that we look at.

Q. Okay. What are other measures that you look at?

A. Absolute dollars, targets can be an absolute specific dollar amount.

Q. Yes.

A. And then it's up to us to develop the programs to meet those goals.

Q. Are you familiar with the term "manufacturing margin"?

A. Yes.

Q. What does that mean?

A. That would be the difference between the cost to produce the product and the selling price.

Q. Does BIS expenses and profit have to come out of that margin?

A. Yes.

[p. 59] Q. Does it come from anywhere else?

A. What do you mean?

Q. Are there other sources of that profit? You don't have any other sources of profit, or do you?

A. I'm not sure I understand the question. Profit only comes from the products we sell, if that's your question.

Q. Products and services? And services are gauged in the same way, are they?

A. Generally.

Q. Cost of services sold?

A. Yes.

Q. If you will?

A. Yes.

Q. And versus selling price?

A. Yes.

Q. Okay. And the Service Division is part of BIS; is that right?

A. No, it's not, it's a separate division.

Q. Separate division?

A. Yes.

Q. And the name of that division is?

A. CESD, Customer Equipment Service Division.

[p. 60] Q. And how do you allocate services you receive from other divisions, or assistance you receive from other divisions?

MR. PICKETT: For what purposes?

MR. HENNEFER: For purposes of profitability in BIS.

A. The Service Division, I assume, develops their own system. I'm not familiar with how they do that specifically.

Q. Market Intelligence is a subdivision of BIS?

A. That's correct.

Q. And all of the support that you get you get internally from BIS, you don't get outside support from other divisions?

A. I don't understand the question.

Q. For which you are charged?

A. Oh. Might other divisions give support for which there is a bill-back?

Q. Yes.

A. I guess that's true.

Q. What other divisions would those be?

A. Specific chargebacks. Well, any, if we contracted for any specific services. But generally

. . .

[p. 80] A. Some I would, yes.

Q. What about forecasting, did you receive the reports from Forecasting?

A. Yes.

Q. How about product program reports?

A. Well, again, many of them. I don't know that I got all of them.

Q. Are you familiar with how the machine warranties and service contracts work in a general way?

A. In a general way, yes.

Q. Okay. And how do those work?

A. Well, the warranty is a specified period of time after installation during which we pay the costs of service. After that, the customer has an option of a service agreement or to pay on service on a per call basis.

Q. What are the time periods on those?

A. Oh, normally product equipment warranty is 90 days, but that has varied over the years.

Q. And when a machine is sold, what percentage of those machines after the warranty runs out take a service contract?

MR. PICKETT: Reader-Printers or -

[p. 81] MR. HENNEFER: I'm just talking Reader-Printers, yes.

A. I don't know the specific Reader-Printer number.

Q. Do you have any idea what range it's in?

A. Well, in general, it's over 80 percent for all our products, so I assume Reader-Printers would fall into that range.

Q. Has that been the same from 1977 through 1984?

A. In a broad range, yes.

Q. Would it have increased or decreased during that period? Is there a larger independent service organization now than there was earlier?

A. I don't think there has been a significant change one way or the other.

Q. So in the Reader-Printer market, somewhere in the range of over 80 percent would take a service contract from Kodak?

A. I assume that's true.

Q. In the sales area of BIS, did you gauge paper sales against machine sales, write the two of them?

A. I don't understand the question.

EXHIBIT G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, - against - EASTMAN KODAK COMPANY, Defendant.	No. C871686 WWS

DEPOSITION UPON ORAL EXAMINATION OF:
Emmett A. Gross

LOCATION: Rochester Plaza
70 State Street
Rochester, New York 14614

DATE: December 8, 1987

TIME: 9:45 a.m.

REPORTED BY: MARIA A . WOLCZYK , CSR , RPR
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 32] accounting value.

Q. Is the price set on that part if it's used under an EMA the same as the price that is charged to a customer on a per call basis for that part?

A. Is the price set to whom?

Q. The price set to CESD.

MR. WALL: By whom?

MR. HENNEFER: By the parts center.

A. CES –

MR. WALL: Let me just tell you one thing, so we can move on. The CESD Parts Services is, as I understand it, a part of CESD. So you are assuming a sale to CESD. CESD does procure parts but it will procure them

either from parts manufacturers or KAD or some other entity. That might help you in framing the question.

Q. Is that correct, sir, what he's just described?

A. That's right. Parts Services, which is a part of CESD, buys from you know . . .

Q. The manufacturers?

A. All vendors, whether those are internal or external to the company. So the part is [p. 33] there. It's within that – when I said purchase, we purchase that general service from them.

Q. With regard to micrographics parts and photocopy parts, are the prices set on those the same whether they are used on a per call basis or whether they are sold to a third party?

MR. WALL: Which prices?

A. That was my question before. I am sorry, but you haven't explained to whom. If you are talking to the –

Q. The price that is charged to the equipment owner?

A. All right.

Q. Or the purchaser of that part, the third-party purchaser of that part. Is there a difference in the price that is charged on a per call basis to the equipment owner and the price that is charged to a third party who buys a micrographics or photocopy part?

A. We sell – we have a price list on all of those parts, and that price list is for anyone who purchases parts from us.

Q. Whether it's on a per call basis in connection with service from CESD or whether it's [p. 34] a third party; is that correct?

A. We would sell the part at the same – generally at the same price.

Q. When you say generally at the same price are there exceptions?

A. Well, I think we do give in micrographics a discount or a change depending on the speed with which they want it delivered. I mean emergency orders.

Q. Cost more?

A. I am not completely familiar with Parts Services, but there is a general policy there that would have a difference, list price as published.

Q. You generally described to us the replacement parts policy on photocopy equipment, and the review of the policy in April, 1985, with regard to micrographics replacement parts. You are familiar with those; is that correct?

A. I am familiar with the 1985 review of micrographics.

Q. Can you tell me why the two policies at this time differed, that is between photocopy equipment and micrographics equipment replacement [p. 35] parts?

A. You are talking in 1985?

Q. Right.

A. At the time –

Q. the review took place resulting in your joint letter of April, 1985.

A. I don't think we generally had much of a policy in the BIS area in terms of, you know, complete policy at that time. We had a policy where we were selling parts at that time to people, and Copy Products we did not have that, our policy was not to sell parts.

Q. Do you know why it developed that way?

MR. WALL: Why which policy developed which way? It's a compound question, that's the problem with it.

Q. Why it developed that there was a dichotomy between the two?

MR. WALL: Well, I object to the question in that I don't think that there's a foundation that the witness has an understanding of why the Copy Products policy developed the way it did, and without that foundation he cannot explain the dichotomy.

* * *

[p. 41] out of that.

Q. Was there any discussion at the same time about the volume of sales, whether that should be increased or decreased at CES Parts Center?

A. I don't think we had any discussions or hardly any discussions relative to sales. We knew what they were.

Q. During the 1985 through 1987 period, has the inventory level of CES Parts Center been reduced?

A. Since 19 –

Q. '85, yes.

A. I'm not familiar with where their inventory is at the current time. I am sorry, but I'm not involved in that business. I think we did.

Q. Okay.

A. I think we did make some improvements in that asset.

Q. Okay. Do you recall what the amount of those improvements on a percentage basis was?

A. No.

Q. Okay. When you say in paragraph 6 of [p. 42] your Declaration that everyone agreed that $16 million of micrographics equipment parts in stock was too high, how was it established that this was too high?

A. I'm not sure if we had a specific methodology to determine that. I think it was just felt that that was a lot of money tied up in inventory.

Q. What other parts are sold from the CES Service Center besides micrographics parts and photocopy parts?

A. From our Parts Services?

Q. Yes.

A. They generally sell parts on all products.

Q. Every piece of equipment or product made by Kodak?

A. I think so, yes.

Q. Okay.

A. Generally, they are a parts center, so for customers they are the ones handling those parts for everyone, where we make them available.

Q. Are you familiar with what the total volume of parts sold out of CES Parts Center is?

[p. 43] A. No, I'm not familiar.

Q. Were there reviews by other divisions, that is other than the micrographics, the BISD Division, about the parts inventory at CES Parts Center?

A. There's a general review of that asset on an ongoing basis. It's an important part of the business, so that there's a continuous look at that.

Q. And was it specifically looked at with regard to other areas besides the micrographics parts in or about 1985?

MR. WALL: If you know.

A. I'm not positive what all the reviews were.

Q. Do you recall whether there was a review of any other inventories besides the micrographics inventory at CESD Parts Center?

A. I think there's generally a review of that asset, as any cost element, it's an ongoing part of business.

Q. What I'm asking you specifically is if you know of any other specific division's parts besides BISD's that were reviewed in 1985?

[p. 44] A. No.

MR. WALL: I'll object to the question, no foundation the witness would have knowledge of that.

Q. What?

A. The answer is no.

MR. HENNEFER: It's not a foundation. He either has knowledge or he doesn't.

MR. WALL: Just so it's clear, there's no reason to believe that he would know about such a thing.

MR. HENNEFER: There is. In fact, it says, "At that time there was a growing recognition throughout the entire company that we needed to improve management of our physical assets." But . . .

Q. What knowledge did you have, if any, that service organizations were actively attempting to take away the – independent service organizations were actively attempting to take away revenues from Kodak?

MR. ROMEYN: Paragraph 7.

MR. WALL: You are referring to paragraph 7 of the Declaration?

[p. 45] MR. HENNEFER: That's correct.

MR. WALL: Do you want to take a moment to review that?

THE WITNESS: Could I please?

MR. HENNEFER: Sure.

(There was a pause in the proceeding.)

A. Could you repeat the question, please?

Q. I'm asking you what knowledge you had that independent service organizations were actively attempting to take away service revenues from Kodak.

A. We had general knowledge from field reports. We knew some field engineers had left us to work for – to go into business.

Q. And this was a new phenomenon in around 1985?

A. It was getting more of a – more apparent than it had before, I think is the proper description.

Q. When you say "more apparent," was an attempt ever made to quantify it?

A. No, I don't think we really have any ability to quantify it.

Q. Did Kodak keep track of the machine [p. 46] populations for micrographics equipments in 1985?

MR. WALL: Do you understand what he means by machine populations?

A. You are talking about all the equipment that Kodak has –

Q. Sold.

A. Has sold over a period of time?

Q. Yes.

A. You try to understand that but there's no precise – there's no absolute way of knowing that.

Q. Did Kodak estimate what percentage of that population was on a Kodak EMA?

A. We talked about that. I don't think we could really – we really couldn't understand – you cannot track a piece of equipment, you do not know where it is after we sold it. So we did not have a number in terms of that.

Q. Was that the case both with micrographics and photocopy, in your experience?

A. Yes. That's true, because we don't – you have some feel for what it is but there isn't a way of tracking equipment.

Q. Now, this awareness of the competition [p. 47] from ISOs, did it relate to private accounts or government accounts or both?

A. What marketplace are you referring to?

Q. The ISOs in the micrographics area.

A. The knowledge I had?

Q. Yes.

A. I don't think we looked at it in terms of particular marketplaces. We were just aware that they were involved and we were aware of sales to them.

Q. Your specific knowledge of CPO Limited, where did that come to you from?

MR. WALL: This was switching to copy again, just for the record here.

MR. HENNEFER: Yes.

MR. WALL: I take it we are also switching time frames.

MR. HENNEFER: Right.

A. That came from the field.

Q. When were you first aware of micrographics, micrographics ISOs?

A. I think we had been aware of them in general for quite a while, because we had . . .

Q. Because you had?

[p. 48] A. I don't know of any start date but probably when I was national manager I was aware that there were ISOs involved in micrographics.

Q. And you were aware of these because you were selling parts to them; it that correct?

A. Yes. And from knowledge, as I said before, of field engineers who had left and it was our understanding they were going to service equipment.

Q. Did Kodak keep track of the amount of parts that were sold to third parties from the CES Parts Center?

A. We were generally aware of that because we know where we are selling.

Q. Was there a substantial increase in the number of those parts being purchased during the period just prior to 1985?

A. I don't know what you mean by substantial. There was an increase in that, you know, activity.

Q. Was that one of the factors that led to the review of April, 1985?

A. It was one of many things we were looking at at that time relative to that policy. [p. 49] And we considered quite a few things.

Q. Was there a discussion of whether there would be any impact on ISOs from the limiting of parts by CES Parts Center to them?

A. Was there any discussion on that?

Q. Yes.

A. Not that I recall.

Q. There was no discussion on that issue?

A. Discussion was primarily around the impact it was having on us.

Q. Was there any discussion of whether the ISOs would be allowed to purchase parts and inventory them themselves from Kodak's vendors and suppliers?

A. Which are you referring to and what time frame?

Q. 1985 time frame, micrographics.

A. In micrographics?

Q. Yes.

A. Could you repeat the first part of that then? I am sorry.

MR. HENNEFER: Okay. Do you want to read that back?

(The reporter read back the pending [p. 50] question.)

A. I don't think there generally was, because we were going to continue to sell.

Q. When you say "we were going to continue to sell," do you mean –

A. What they had been purchasing.

Q. So that issue did not come up because it was felt that the ISOs would still be able to get micrographics parts and so they would not seek to buy them from OEMs; is that correct?

A. I don't recall specifically talking about that. Our conversations were around our policy and what we should do.

Q. And not about the impact that policy would have on ISOs?

A. You know I don't recall all that conversation. But I think one of the things we did talk about was we agreed to continue to sell them parts.

Q. Okay.

A. We could have agreed not to sell them. We agreed to continue to sell them for the current products that they were servicing. So there was some discussion around that, because we said we [p. 51] would continue to do so.

Q. Why was it you agreed to continue to sell them the parts, your understanding?

A. We had been selling them parts, and I think we thought it was the fair thing to do.

Q. Okay. In April, 1985, Kodak had made a decision, did it not, to refuse to sell parts to new equipment starting with the Reliant 1000 and I believe the IMT 150 to

people who did not purchase parts directly from Kodak; is that correct?

MR. WALL: Just for the record, the decision was to not sell parts relating to those new products. You said parts to them, it sounded a little funny.

Q. Is that correct?

A. What – we set the policy not to sell them parts starting with the Reliant 1000.

Q. And other new equipment; is that correct?

A. And future products.

Q. And since then, what future products besides the Reliant 1000 have been added to that list?

MR. WALL: Well, I object. There's no

* * *

[p. 59] you experienced loss of business to ISOs for the service of micrographics equipment?

A. I don't think we know, because we don't end up talking directly to those customers.

Q. Okay.

A. It's not our policy. We generally wouldn't talk directly to those customers. We have general feelings for what they might be but we don't know.

Q. What were your general feelings at that time?

A. Well, I think in any industry it can be price, it can be performance.

Q. So it was your understanding that both price and performance were reasons why ISOs might have been chosen over Kodak?

A. I'm not aware of performance. Price is certainly an issue. I'm more –

Q. You are aware of switches that were made because of price?

A. In the feedback we have received from regional managers, the comments, to my knowledge, were more in the area of price than Kodak's performance on that equipment.

[p. 60] Q. What, in April of 1985, was your familiarity with the inventory levels for micrographics parts of specific items? Were those kept at fixed or predetermined levels at CESD Parts Center?

A. Individual parts?

Q. Yes, right.

A. I'm not sure quite what you mean by kept at predetermined levels.

Q. For example, how would CESD determine how many fuser rollers to have on hand?

A. Well, it's a function of demand and it's also a function of, you know, economics in purchasing parts from vendors, you know. It's some modeling technique that they use that takes into consideration several variables. But they are probably two of the major ones, that I recall.

Q. When you say they, who are the "they" that have modeling techniques for ordering or specifying how many parts should be ordered and kept in inventory at CESD Parts Control?

A. Parts Planning people within Parts Services would monitor that.

Q. Who was in charge of that in 1985?

* * *

[p. 62] levels or reduced?

A. General anticipation, that we could reduce the parts levels.

Q. The demand that you referred to that determined parts levels, was that based upon an historic demand?

MR. WALL: At what time?

MR. HENNEFER: We are in the same time frame here. April of 1985.

A. April, 1985?

Q. Yes.

MR. WALL: So you are asking him whether as of that time the demand level that was used to set inventory was historical demand?

MR. HENNEFER: Yes.

A. It was historical demand plus some anticipation, planning of the future.

Q. Anticipation of greater sales or greater demand?

A. Of change in sales.

Q. And when you say "change in sales," that could have been an increase or a decrease in sales?

A. Yes, it could have been.

[p. 63] Q. Of parts or of machines or of both?

A. We don't sell machines. But of parts. In Parts Services area, it would be a change in parts, either plus or minus.

Q. Were the demand for parts not calculated on the basis of machine populations, and an increase in machine populations would increase demand for certain parts, or was it solely on parts demands?

MR. WALL: I take it you mean wasn't that one consideration?

MR. HENNEFER: Yes.

A. You are looking at both, you are looking at demand and anticipated demand.

Q. Was the demand scaled down after April of 1985, the historical demand or the anticipated demand based upon the new products for the micrographics parts?

MR. WALL: For which products?

A. For products prior to RIM 1000?

Q. Yes.

A. I think it was. That was our intent, to scale that down.

Q. And why was that going to be scaled [p. 64] down?

A. Because we wouldn't have necessarily needed to have parts at the level we had them prior to that.

Q. Because you would be able to accumulate orders and then place those orders as they were accumulated; is that the thinking?

A. Yes.

Q. With regard to the policy that you were only going to sell new parts, that is parts to the Reliant 1000 and subsequent machines to direct purchasers from Kodak, how did you identify who was a direct purchaser as of April, 1985?

MR. WALL: Object to the question. It assumes a fact not in evidence.

MR. HENNEFER: Which is?

MR. WALL: Well, I'll go ahead and tell you in this instance. You are assuming that in April of 1985 they made a determination of who was a purchaser and who was not.

MR. HENNEFER: Well, if they didn't make a determination or couldn't, then answer it; say, "we didn't or we couldn't."

Q. Could you make a determination in April, [p. 65] 1985, when a part was ordered whether that part was being ordered by an owner of a Kodak Reliant 1000?

A. I would think they could. I'm not familiar with all the records out there. They would know if it was a part for that product. They would know who the customer was.

Q. And they could match that up when the part was ordered; is that correct?

MR. WALL: If you know.

A. I'm not sure exactly how they would do that.

Q. Did they do that, in fact?

MR. WALL: Who is "they"?

MR. HENNEFER: The people at Parts Services, of course.

A. Parts Services. That was the policy we set, for them to do that, to monitor that and to implement that policy.

Q. Yes. Do you know how that policy operated in practice?

MR. WALL: As of what time?

MR. HENNEFER: Talking about the same time frame, April of 1985.

[p. 66] A. Which policy, in terms of selling it?

Q. Yes. In terms of selling the parts for the Reliant 1000?

A. Do I know if it was implemented?

Q. Yes.

A. To my knowledge, it was implemented, but I don't have –

Q. But you don't know how?

A. Specifically how they did that?

Q. Yes.

A. No.

Q. Okay.

A. I don't know exactly how they did it.

Q. Who would have been aware of that at that time?

A. Manager of Parts Services would have implemented that policy.

Q. And who was that?

A. As I said, it's either Jim Wheeler –

Q. Or John Englert?

A. – or John Englert.

Q. In April, 1985, you have stated in your declaration that there was considerable sentiment for cutting off all parts of micrographics

* * *

[p. 71] Q. Okay. What was the primary reason you made that decision?

A. I think for all the things that we have been talking about, from, you know, reducing your assets, from looking at our customers and the satisfaction level we have with those customers as they look at Kodak, those are the types of reasons, you know, concerns from the field that were coming in about that which could impact our ability to sell product.

Those are the major considerations.

Q. Did you feel that ISOs that you had been selling parts to were taking unfair advantage of Kodak?

A. Well, to some – I don't know if unfair advantage is the right word. But certainly we were providing them with parts which we had invested a lot of money in and which they did not have to invest an equal amount.

Q. Did Kodak make a profit on the parts that it was selling in the micrographics area to ISOs in April of 1985?

MR. WALL: Objection. The question is compound, if you are talking about a lot of [p. 72] different parts, or it's vague, to the extent that you are trying to make some broad statement as to whether Kodak's aggregate part sales were profitable. And if that's your question, I'll object also on lack of foundation.

MR. HENNEFER: Read the question back, please.

(The reporter read back the pending question.)

MR. WALL: I take it you are standing with the question, counsel?

MR. HENNEFER: Yes.

MR. WALL: He wants you to answer that question, if you understand it.

A. I don't know if they got their full return back on those parts or not.

Q. You don't know whether they did or whether they did not?

A. The accounting system in Eastman Kodak Company is such that I am not sure if we got full return back from our research and development cost or not.

Q. Okay. When you say "full return," is that a term that includes research and development [p. 73] cost, as well as the cost of the parts and overhead costs and some other elements, is that what you are referring to?

A. Yes.

Q. And you were unable to CES Parts Center to determine whether that was the case or you do not remember; which is it?

MR. WALL: If it's either one of those. It may be a third option.

MR. HENNEFER: Or a fourth or a fifth.

THE WITNESS: Repeat the question, please.

MR. HENNEFER: Read the question back, please.

(The reporter read back the pending question.)

MR. WALL: Do you understand the question?

A. To my knowledge, we were unable to determine that full cost.

Q. In the accounting system of Kodak, you were unable to determine what the full cost of those parts were; is that correct?

A. That's correct.

[p. 74] Q. So you could not tell –

A. With my knowledge of that accounting system.

Q. They could not determine that?

A. Not do a profit.

Q. How were parts priced if not with regard to recovering a fair return on those parts when they were sold to ISOs from the CES Parts Center in April of 1985?

MR. WALL: Objection, no foundation the witness is competent to testify about that.

You may answer it, if you know the answer to it.

THE WITNESS: I am sorry, I want the question read back.

MR. WALL: Please read the question back.

MR. HENNEFER: That's fine.

(The reporter read back the pending question.)

A. I am not – I am not involved in parts pricing.

Q. Do you have an understanding, any understanding of how those were set?

* * *

[p. 77] A. I don't have personal knowledge.

Q. As to whether it was or was not implemented?

A. Whether it was or was not.

Q. Do you have any knowledge that anybody has told you of whether it was implemented or not, as opposed to personal knowledge?

A. I think Mr. Lorenson knows.

Q. Was it your understanding that it was not, in fact, immediately implemented?

A. No. I don't know whether it was or wasn't. As I said, I think Mr. Lorenson knows. He took over shortly thereafter.

Q. So you have no personal knowledge of that; is that correct?

MR. WALL: Of what now? Now I'm not sure what the question is. I am sorry.

You might just want to ask him does he know whether he had it implemented while he was there.

MR. HENNEFER: It's been asked.

MR. WALL: Well, did you understand that to have been asked?

A. If the question is, do I have personal [p. 78] knowledge of whether that policy was implemented immediately, I think is your words –

Q. Yes.

A. – I do not have personal knowledge, I am not sure.

Q. Okay.

A. I would have thought it would have been.

Q. You don't know, don't have any personal knowledge of that?

A. No.

Q. Do you have any additional knowledge of whether it was ever implemented?

A. This is as it relates to filling orders, not –

Q. Filling orders out of inventory rather than requiring that ISOs order parts in advance.

A. I think it was implemented, in just some general discussions I've had with people. I think the policy was implemented.

Q. You are presently responsible, Mr. Gross, are you not, for the implementation of Kodak's policy regarding parts for photocopy machines; is that correct?

A. Yes, that's correct.

[p. 79] Q. You are also responsible for the servicing of used copy machines by Kodak?

A. Our used equipment.

Q. I am sorry?

A. Our used equipment.

Q. Used equipment of customers, whether they were customers of Kodak or a broker or a third-party equipment dealer?

A. If you are referring to our servicing of equipment, I am familiar with what we are doing, yes.

Q. Okay. What do you understand the current policy of Kodak to be with regard to the sale of copier parts to third parties?

MR. WALL: You mean third-party service organizations?

MR. HENNEFER: Any third parties, with regard to any third parties.

MR. WALL: I guess I don't know what you mean by third parties. Anybody but Kodak?

MR. HENNEFER: Yes.

MR. WALL: Okay. So including Kodak customers.

MR. HENNEFER: Right.

[p. 80] A. We sell parts to Kodak customers, Copy Products, that purchase equipment from us. We do not sell parts, never have sold parts, to people who are not purchasing equipment from us.

Q. To your knowledge, was Kodak ever approached by any independent service organizations before they began servicing photocopy machines of Kodak to determine whether parts would be available for those service activities?

A. To my knowledge, no one approached us. No one approached me.

Q. Now, from your experience, how does Kodak determine presently whether a purchaser of parts was a direct machine purchaser from Kodak?

A. Repeat that, please.

MR. HENNEFER: Want to read that back for him?

(The reporter read back the pending question.)

A. It's my understanding we know who we have sold equipment to, and we know who we are selling parts to. Therefore, we can compare.

Q. Can you match those up on a computer [p. 81] when a part is ordered?

A. We match them up in some method, manual or computer. Some means.

Q. So with regard to photocopy equipment, you have and can keep track of people who have purchased photocopy equipment directly from Kodak; is that correct?

A. Yes.

Q. And match that up against parts orders when they come in; is that correct?

A. It's my understanding we can do that.

Q. And you do, in fact, in practice do that?

A. I don't think that's done on a routine basis. It's monitored.

Q. When you say it isn't done on a routine basis but it's monitored, what do you mean by that?

A. I'm not completely familiar, but I don't think every order is screened, if that's at that time, it's –

Q. How do they screen them if they don't screen every order? Is it a random screening or is there some mode or method to the screening?

* * *

[p. 88] MR. HENNEFER: I want his answers, counsel. I want the witness to answer and testify.

MR. WALL: The policy has been stated. You tried to restate it in a very misleading way and I object to that.

MR. HENNEFER: Okay. We'll go back to the question.

Q. Have there been discussions of preventing photocopy replacement parts for Kodak equipment from getting in the hands of independent service organizations?

A. Yes.

MR. WALL: Can I have that read back, please?

(The reporter read back the last question.)

MR. WALL: Let me ask you for a clarification. When you talk about photocopy replacement parts, are you talking about such parts after they have first come into the possession of Kodak or are you also talking about – again you have made inquiries in the past about parts from the OEMs themselves. I think the [p. 89] distinction is important in this case.

MR. HENNEFER: Either.

A. I'm not knowledgeable about OEMs, as I've said.

Q. Okay. Then ___

A. We have had discussions about, you know, our policy relative to selling parts to direct customers and not selling parts to people who are not our direct customers. We have had those discussions.

Q. Okay. And what, those discussions have been with regard to preventing replacement parts of Kodak photocopy equipment from getting into the hands of independent service organizations after Kodak has sold them?

MR. WALL: Of course he is asking about conversations of which you are aware of.

MR. HENNEFER: I'm going to object to your coaching the witness. I would like the witness' straight and direct answers. If he didn't have conversations, he can simply say, "I'm aware of none or there were none, to my knowledge."

I don't want counsel testifying, I would [p. 90] like to have the witness testifying. And if we have to go before Judge Schwarzer on this, there's going to be a very bad record from the standpoint of counseling the witness. I would like to repeat this question again –

MR. WALL: Let me say this before you do. There's two ways to do this. Obviously, you don't want me to do it the way I'm doing it. I will do it the other way. From now on if you ask a question that says "Has Kodak had discussions about" something, I will object to the question. And I will insist you only ask whether this witness has had discussions or is he aware of specific discussions of Kodak personnel. Because you can't ask the broad question, "Has Kodak had a discussion," and then object to my saying, "Well, I take it you are only asking about the ones that he knows about." Because Kodak is an enormous organization.

MR. HENNEFER: Okay. Do you want to read the last question back, please?

(The reporter read back the pending question.)

A. I am sorry, I still don't understand the [p. 91] question. As it started off it sounded like a continuation of another.

Q. Are you aware of any discussions within Kodak with regard to preventing photocopy replacement parts for Kodak equipment from getting into the hands of independent service organizations after Kodak sells them?

A. I think those discussions have taken place with Lynn Gleason, as I recall.

Q. Okay. Were you present at any of those discussions?

A. We have had general discussion about parts and implementation of our policies, so – and I've been involved in discussions with her in that area.

Q. And in connection with those you have discussed, have you not, the preventing of photocopy replacements parts from getting into the hands of independent service organizations after Kodak sells them; is that correct?

A. Sells them to whom?

Q. Sells them to anyone.

A. The parts that we are selling, to my knowledge, to direct customers, we are selling [p. 92] them to those customers. To our knowledge, those customers are using them for their equipment, to service their equipment.

MR. HENNEFER: Move to strike the answer as nonresponsive.

THE WITNESS: Sorry. I am trying to answer.

MR. WALL: Don't be concerned with the motion to strike.

MR. HENNEFER: Would you read the question again?

(The reporter read back the last two questions and answers.)

MR. WALL: There's no pending question.

Q. I will repeat the question again. In connection with your discussions of implementation of the policy, have you discussed with Ms. Gleason or anyone else preventing independent service organizations from getting replacement parts for Kodak photocopy equipment after they are sold by Kodak?

A. As I said before, we have had discussions about selling to direct customers. And are they using those – you know, in our [p. 93] knowledge are they using those parts, is that where they are going. And that's where the discussions have been. And some discussions around where are third-party service getting their parts.

Q. When you say where the parts are going that are being sold to direct customers of Kodak, have you specifically discussed whether those parties are reselling those parts to independent service organizations?

A. Yes, we have generally talked about those and looked at those parts being sold to direct customers, and

is our belief that they are using them for servicing of their equipment. We have had those.

Q. In those discussions, was it your belief that that was the case?

MR. WALL: Asked and answered.

You may answer.

A. Sorry. To my knowledge, the information I am receiving back from people, that is the case. We are selling them parts, they are using them for –

[p. 94] Q. And they are not reselling them to ISOs?

A. To my knowledge, they are not reselling them. The information that I said I received back is that they are using them for what we intended.

Q. Their machines?

A. Yes.

Q. And so there was no discussion in discussions you have described about preventing parts that are sold to direct purchasers of Kodak equipment from being resold?

A. I don't think generally because the question was the parts we are selling to the direct customers, to Lynn Gleason, to our assumption they are using them for our equipment, and the answer is yes. That they are buying parts and they are using them on their equipment. That is what our policy was and that is what we – you know, I was questioning her about the implementation and she assures me that to the best of her knowledge that's what's going on.

Q. Now, in these discussions, did you discuss what Ms. Gleason or anyone else's understanding was as to where independent service organizations were getting replacement parts for

* * *

[p. 96] possibilities discussed?

MR. HENNEFER: Right.

A. Field engineers.

Q. And what was discussed with regard to field engineers?

A. Are field engineers, you know, using the parts for what we gave them parts, which is to use on our equipment? Field engineers have an inventory of parts. The integrity of that inventory.

Q. So the discussion was to the effect that field engineers would be selling these parts to independent service organizations; is that correct?

A. That is a possibility. I mean we have write-offs in parts, we have lost parts. The question is always, you know, is it poor planning, is it poor management, is it poor bookkeeping, or always the possibility of them using those parts themselves for some reason.

Q. So, the discussion was that the field engineers might be taking parts that are accounted for as lost parts and selling them to independent service organizations, is that what the discussion [p. 97] was?

A. Or using it themselves.

Q. When you say "using it themselves," what do you mean by using it themselves?

A. For other than the service, you know, of Kodak customers where we have a contract with them.

Q. Do you mean servicing on their own time Kodak machines and using the parts for that service?

A. Kodak or other – or some machines, yes.

Q. I'm afraid I don't understand. Using Kodak parts for other machines, other manufacturer's machines?

A. No, on Kodak equipment.

Q. That was not under an EMA or a per call?

A. With us.

Q. You mean moonlighting, in effect?

A. It's always a question.

Q. Now, was it also a question that field representatives might be stealing parts from their inventory and selling them to independent service organizations?

A. I'm not sure, I guess it's stealing. [p. 98] But take parts out of their inventory and moving them. They have a lot of money tied up in parts.

Q. Moving them, you mean selling them to other –

A. Sure.

Q. – independent service organizations?

A. They have parts and tools and they are part of our big asset and we are trying to monitor that always out there. So there's discussions around that.

Q. When you say discussions around that, were any service representatives or field representatives accused of that?

A. Have there been?

Q. Yes.

A. Relating to Copy Products?

Q. Yes.

A. I don't think so, in Copy Products.

Q. In Micrographics products, have there been?

A. Yes.

Q. And specifically, what was the accusation, that they were selling them to independent service organizations?

* * *

[p. 103] A. She really had the responsibility at that time to discuss with the field, you know, what our current policies were related to our terms and conditions, you know, general policy. That's her area of expertise. And she was kind of a staff, if you will, staff person to the field to answer questions that they might have in any area.

Q. Why was she particularly interested in where ISOs were getting their parts?

A. As I said, I don't know why – I don't think she was particularly interested in that. It's just that there were conversations going on in those areas, from the field. You know, I don't know if they originated in the

field or from her. If they were, they weren't driven by a particular thing other than people seeking information.

Q. For what purpose were they seeking that information?

A. I think just understanding.

Q. Was there any attempt by Kodak once that information was received to cut off those sources of parts for ISOs for photocopy equipment?

A. I don't think in any of those – I don't think in any of those questions – or I don't [p. 104] think in any of those conversations we – you know, are aware of, or at least I'm not aware of sources. So you say Kodak cut them off, I don't think Kodak was – I don't think Kodak in total is aware. And I was not aware of, you know, a particular source.

Q. Were you a party to any discussions where it was discussed that if sources were found by Kodak, they would be cutoff?

A. I think I've said that if we were aware of a Kodak customer where we had sold them parts, were selling parts, we would have had conversations with them. And discouraged that from taking place.

Q. Discouraged that by telling them to stop or be cutoff?

A. I think we would try to work it out with them to stop doing that.

Q. And if they did not stop?

A. I think we would probably discontinue selling them.

Q. Parts?

A. Parts, yes. You know, it's a hypothetical.

[p. 105] Q. But that never occurred, to your knowledge?

A. Never, to my knowledge, no, it didn't occur.

Q. Would you refer to what has been produced as document number 1284 through 1286, which is the April 12, 1985 memorandum to district sales managers and district service managers, from you and J.A. Lacy.

MR. WALL: Let me just state for the record, we did not bring with us a set of the documents that were produced, some 3,500 or better pages. I take it what you are referring to is the exhibit to the Declaration, Exhibit 1 to his Declaration; is that right?

MR. HENNEFER: Right.

THE WITNESS: There's no number.

MR. WALL: That's what we have it as.

MR. HENNEFER: I discussed earlier this morning with Mr. Romeyn what we had done in the past. And I had thought that this was what we had agreed with Donn to do on these depositions, is just to have two sets of the documents with numbers so that we would not attach the exhibits

* * *

[p. 138] that parts would not be purchased for anything but for use in a machine that was purchased from Kodak; is that correct?

A. Right. Just want to monitor the policy that we set, which was important to us, was implemented.

Q. And so that those parts do not get to ISOs as well; is that correct?

A. So that – yes. So that those parts stay within – those parts go to the dealers that we anticipated them.

Q. And are used in the machines that you want them to be used in?

A. And are used in those machines.

Q. Is that correct?

A. Yes.

Q. Was any attempt with regard to photocopy parts made to assure that no extraordinary number of parts was ordered for a particular photocopy machine owner, so that parts would be assured of being used for the maintenance or repair of the machine that was bought directly from Kodak, the machine or machines?

A. Yes, I think that was generally looked [p. 139] at as, you know, is this a reasonable amount of parts. It's very difficult to tell, you don't know what they are doing or how they are servicing or how many parts they are using. But looking for some level of reasonableness to what they are doing.

Q. And the purposes are the same, to assure that those parts went into a machine that was purchased directly from Kodak?

A. Yes.

Q. And to assure that those parts were not used by ISOs?

A. To assure that those parts were purchased and used as we agreed with that particular customer.

Q. And not resold to ISOs; is that correct?

A. Not resold to anybody.

Q. Including ISOs?

A. Yes.

Q. Do you have any information that parts were being resold to anybody but ISOs if they were being resold on that basis from people who purchased parts?

A. I'm not aware of any.

* * *

EXHIBIT H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, – against – EASTMAN KODAK COMPANY, Defendant.	No. C871686 WWS

DEPOSITION UPON ORAL EXAMINATION OF:
Edward V. Ince

LOCATION: Rochester Plaza
70 State Street
Rochester, New York 14614

DATE: December 9, 1987

TIME: 9:36 a.m.

CONFIDENTIAL INFORMATION APPEARS ON PAGES 59 AND 60

REPORTED BY: MARIA A. WOLCZYK, CSR, RPR
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 82] EDWARD V. INCE – DX BY MR. HENNEFER

Q. What makes a person eligible to purchase a part in the Micrographics area for parts prior to the Reliant 1000?

A. My understanding is that for the older equipment, that if that individual has purchased parts in the past, that they are eligible to purchase parts at the present time and into the future.

Q. So only individuals then that show up on the screen that Kodak knows has purchased micrographics parts in the past are eligible then to purchase any micrographics parts, when we say any, other than the parts for machines after the Reliant 1000; is that correct?

A. That is correct. But there would have to be an indication to the individual filling the order whether that customer is a non-user in the context of Business Equipment, BIS.

Q. That is had or had not purchased equipment directly from Kodak in the Micrographics area?

A. That's correct. There would have to be that indication. Because if we have a marginal inventory situation on that part, then there would [p. 83] be a delay involved in filling that order. So there would have to be some indication as to the eligibility of that purchaser.

Q. If the screen showed that the entity ordering the part had not purchased photocopy equipment, then no parts would be sold to them; is that correct?

A. If the screen showed that they had not purchased copier equipment.

Q. From Kodak.

A. From Kodak. I don't know that the screen would show.

Q. It –

A. It might show it that way, it might not.

Q. Yes.

A. But if it indicated they were not eligible to receive the part through whatever indicator, and I just don't know what terminology might be on the screen, then the part would not be shipped.

Q. What other elements besides non-ownership of equipment purchased directly from Kodak would make a person ineligible to order parts from the Parts Center?

[p. 84] MR. WALL: For what kind of parts?

MR. HENNEFER: For either photocopy or micrographics.

A. What else might make them not eligible?

Q. Besides having not purchased the equipment directly from Kodak.

MR. ROMEYN: Bad credit.

MR. WALL: I take it you are excluding things like bad credit history or do you want that in there?

MR. HENNEFER: No, I want anything that Mr. Ince is aware of that the CESD organization has established makes somebody ineligible to order parts, besides the fact of not having purchased that part before or

having purchased equipment directly from Kodak, those are the two he has already testified to.

A. I can't speak to the credit part. I'm sure there are procedures that deal with that, I am not familiar with those procedures.

Q. Okay.

A. But in the context of this, I would expect, but I have no personal knowledge, but I would expect that if a third-party service [p. 85] organization which was known to be attempting to purchase parts from us to use those for use in the servicing of other Kodak copiers, that they would not be eligible to receive those parts.

And the example I'm thinking of now is a third-party service organization that might have purchased a copier from Kodak. Third-party service organization purchased a Kodak copier from Kodak, parts would be made available for the service of that copier only. If it were known that that purchaser were attempting to purchase those parts to use them to service copiers from others, it would be so designated that they are not eligible to receive those parts.

Q. Do you know whether any such incidents have occurred, such as you have just described?

A. Specifically, I do not.

Q. In general, do you know whether that's ever come up at CESD?

A. You mean that that has occurred?

Q. Yes.

A. I do not.

Q. Are you aware of what the policy with regard to third-party service and parts is for

* * *

[p. 104] there a distinction between parts for micrographics equipment in price that is sold on a per call basis, is sold to a self-servicer or is sold to an independent service organization?

A. It's all the same price. I know of only one price on a part.

Q. Is that right? There's a single price that's been established by the business unit?

A. To my knowledge, there's a price, that's correct.

Q. And whether that's sold on a per call basis to a third party or sold to a self-servicer or sold to an independent service organization, it would be the same price; to your knowledge?

A. To my knowledge, the same price.

Q. Are you familiar with any of the machine population of either copiers or micrographics equipment that is out in the field, that's been sold by Kodak and still in use?

MR. WALL: Could you read that back?

(The reporter read back the pending question.)

A. I'm not sure what you mean by "familiar with population."

[p. 105] Q. Does CESD or do the business units trace that?

A. What is the population?

Q. Yes.

A. In other words, what are the numbers of units that are placed?

Q. Yes.

A. Yes. That is tracked in Copy Products.

Q. Or in BISD? I should say is it also tracked in BISD, if you know?

A. Well, it is – it is not as – it's not at all as clean in BISD.

Q. When you say "it's not at all as clean," what do you mean by that?

A. Well, in Copy Products, there is rather diligent recordkeeping of every copier that is produced and where it is, whether it's being used for demonstration, whether it's being used overseas, whether it's being used in-house by Kodak organizations somewhere, whether it's in tests, whether it's been scrapped, whether it's on rental, whether it's sold, whether it's come off rental and is in reconditioning. There's a diligent recordkeeping process because in many [p. 106] cases those are Kodak assets. There's a high percentage of rental and Kodak assets. And so the whole process is structured to keep very accurate records of that.

And so I answer that yes, that the population is tracked carefully in Copy Products.

I have not seen that kind of reporting with regard to business equipment in BIS. It's rather reporting of how many units were sold in a year, that certainly is known. But what happens to them and where they have gone, I have not seen reports like that. We can tell you how many are under contract. Nowhere near the resolution of population.

MR. ROMEYN: Off the record.

(There was a discussion off the record.)

Q. With regard to the tracking of photocopy machines, does Copy Products or CESD, but I assume it would be Copy Products, track the number of EMAs and per call that are being implemented on its photocopy machines –

A. Right, yes.

Q. So then they could establish from those – or I should ask you, can they establish [p. 107] from those how many of those machines are either being self-serviced or serviced by some third party?

A. We know how many machines are out there. We know how many machines are on rental. We know how many machines are on contract.

Q. EMA contract?

A. We know how many machines are on per call. I suppose as a matter of just mathematical subtraction, you could therefore figure out how many were not accounted for.

Now, what's happening to those that aren't accounted for would be I suppose speculative, but that

would be the group within which there could be third-party activity.

Q. Or self-service as well; is that correct?

A. Self-service as well, that's right.

(There was a pause in the proceeding.)

Q. Are you aware from either your experience here in Rochester or any field experience of people, whether customers who have Kodak photocopy equipment or micrographics equipment and also have EMAs on that equipment,

* * *

[p. 112] situations in which independent service organizations claimed to have been given assurance that parts would be made available to them to service either micrographics or photocopy machines?

A. No.

Q. Have either micrographics replacement parts or photocopy replacement parts been supplied on a different basis, that is any of the terms and conditions or price, to one independent service organization as distinct from other independent service organizations?

MR. ROMEYN: Could you read that back?

(The reporter read back the pending question.)

A. No. Not to my knowledge.

Q. Did it become in the 1985 or post 1985 period an area of more concern to Kodak whether independent service organizations were going to be able to get photocopy parts?

MR. WALL: Did you say the post 1975?

MR. HENNEFER: I believe I said '85.

MR. WALL: It's post '85, right?

MR. HENNEFER: Read it back.

[p. 113] MR. WALL: I don't think you need to. We are talking about post '85. We understand that.

(The reporter read back the pending question.)

A. Did it become a concern to us whether they could get parts? -

Q. Yes.

A. I'm really not sure how to answer that, or what you mean. A concern to us where they could get parts from whom, or whether they could get parts from somewhere else?

Q. Yes, whether they could get them from any source.

MR. WALL: Including Kodak?

MR. HENNEFER: I assume his answer is they can't get them from Kodak, so I was really interested in any other source.

A. I don't want to convey that we were preoccupied with this issue, because we were not. This was not a big deal.

Q. Why -

A. We established our policy. There is always a concern as to whether our own people [p. 114] might be

providing parts to others, whether there's any conflict there. There is always a concern as to whether people that leave us and have access or know the routine, whether those people might be obtaining parts from us. I mean that's obviously a concern. But it wasn't any great escalation of concern in 1985.

Q. Why would it be of concern at all, that they would obtain parts, other than what you have described, that it would be a violation of your employee's duties to you or of your policy?

A. Well, that would be a concern.

Q. I understand. Other than those concerns, would it be of concern to you for any other reason?

MR. WALL: That an employee left the company and somehow was obtaining parts?

MR. HENNEFER: Yes.

THE WITNESS: Oh, is that the question?

MR. WALL: I think it was.

MR. HENNEFER: Would you want to read the question back please?

(The reporter read back the pending question.)

[p. 115] MR. HENNEFER: Off the record.

(There was a discussion off the record.)

Q. Other than your concern that employees might be violating their obligations and duties to Kodak by supplying photocopy parts to third parties, why else would Kodak be concerned with whether third-party service organizations were getting photocopy parts?

A. Well, for one thing, we spent a lot of money on parts. Parts represents a significant expenditure for us. And we are attempting to provide the highest quality service we can. But at the same time, manage our costs so that we can be competitive in the marketplace with the Xeroxes and the IBMs. And so cost control is a big – that's a big deal. And we are very interested in where our parts are going and who is using them and how they obtain them. And they are for the use of our people and our customers. And if they are going other places, that's a concern. We want to know about that.

Q. Are you aware of any discussions that have been had within Copy Products or BISD, or in connection with CESD, about pricing parts to [p. 116] third-party service organizations at a higher level or a significantly higher level than those on a per call basis in order to assure cost control, as you termed it, or managing costs, just so you would get an adequate return on that?

A. Pricing the parts higher to third-party service organizations?

Q. Yes.

A. Never.

Q. That's never been discussed as a way of assuring that you would get revenues from those parts that were commensurate with the expenditures put it?

A. Not by me or anyone in my presence.

Q. You have never heard that idea put forward?

A. Never.

Q. If the significant expenditures and management of cost and cost control elements you said were of concern to Kodak, were of such concern, do you know why it has not been considered that a way of recouping these might not be by significantly increasing prices to third-party service organizations for parts?

[p. 117] MR. WALL: Objection to the question, it assumes facts not in evidence. The witness stated it has not been considered by him or anyone in his presence.

On that basis, you may answer.

A. What you characterize in that question would not have fundamentally matched our overall strategy as a service organization. We are not in business to sell parts. So we really have no – we have no strategic thrust or interest in developing a parts resale business for profit. That's not the purpose of our existence.

Q. And I take it when you way "we," you are talking about decisions made at Copy Products and BISD for you to carry out; is that correct?

A. Both, both CESD and the Copy Products organization and BISD. The strategy is for the overall Copy Products business or BIS business to be competitive with their competitors, whether it be Xerox, IBM, Bell & Howell, whoever, and to employ service as a vehicle to be competitive. There's no interest in trying to make a business out of selling parts at whatever prices to make a profit. That's not a fundamental strategy.

[p. 118] Q. So the parts and service are really driven by, if you will, the overall business unit's business, that is BISD's business or Copy Products?

A. That's correct.

Q. And it's not, if you will, a profit center and isn't considered that way; is that correct? When I say a profit center, I'm talking about parts.

A. Parts is clearly not a profit center.

Q. Nor is service?

A. Nor is service. Nor is there any strategic thrust that I'm aware of to make a business out of selling parts at a profit.

Q. Okay. Were you aware through any source prior to your coming into CESD of any attempts to limit either the sale of micrographics parts to third-party organizations or to try to establish and cut off any sources of parts that might be going to independent service organizations in the photocopy area?

A. None whatsoever.

Q. In the 1985-1986 period, were there problems that came to your attention, or alleged

* * *

[p. 127] ask you. What is the case for micrographics equipment? Does Kodak manufacture more or less than 50 percent of its parts?

A. Don't know. I do not know. I really don't know those percentages. That's speculation on my part.

Q. Yes.

A. A high percentage of parts are purchased. But whether it's 50 percent, I just don't know.

Q. In both Photocopy and Micrographics?

A. In both cases, a high percentage of parts are purchased.

Q. Who would know those numbers exactly?

MR. WALL: Well, I think among other people, you would. The information that we provided you, I think we have provided you with a complete list of the parts which we procure from others. And I assume a count. And I think we have also provided you with the total number of parts. So I think you have got that information at your fingertips, or at least at your law clerk's substantial fingertips.

A. I would really be guessing. I know that [p. 128] there's a lot of purchased parts. That's all.

Q. Do you or have you ever had dealings with the original equipment manufacturers who purchased parts for – excuse me, who manufacture parts for Kodak's purchase?

A. I have had – I need to clarify in my own mind. I guess, what you mean by original equipment manufacturer.

Q. I would include in that anyone who manufactures a part for use as a replacement part in Kodak's photocopiers, micrographics machines?

A. A parts supplier?

Q. Yes.

MR. WALL: You may just as a usage want to distinguish, because I think Kodak's usage is different than yours. Those part suppliers are not considered to be OEM suppliers.

Q. Okay. Kodak distinguishes, does it, between an OEM, somebody who manufactures a part put in the original machine, and somebody that supplies the parts?

MR. ROMEYN: No.

A. No. The term OEM to us for clarification is a firm that provides a product to [p. 129] us, such as Canon provides a copier to us. We view Canon as an OEM. Canon provides the product and we resell it. Obviously, Canon also provides the parts for the copier. So in that case, they are an OEM supplier of the product and then a parts supplier.

But there are many parts suppliers that we purchase parts from, we would not refer to them as OEMs.

MR. ROMEYN: The basic distinction being between a finished product supplier and a parts supplier.

Q. So you would consider to be produced parts to be put into Kodak machines?

A. Sell us motors.

Q. Or fuser rollers, whatever?

A. That's right. That's a parts supplier.

Q. Now, the question is have you had any dealings with parts suppliers?

A. No.

Q. Have you fielded any inquiries or dealt with any problems that arose concerning whether parts suppliers would sell parts to parties other than Eastman Kodak?

[p. 130] A. Zero.

MR. HENNEFER: Do you want to take a quick break? We have been going about an hour and a half.

THE WITNESS: I was about to ask for one, too.

(The proceeding recessed at 2:58 p.m.)

(The proceeding reconvened at 3:15 p.m.; appearances as before noted.)

EDWARD V. INCE, resumes:

DIRECT EXAMINATION BY MR. HENNEFER CONTINUING:

Q. Are you aware of how inventory levels for specific parts, either in the Photocopy or Micrographics area, were set at CESD pre 1986?

A. Well, when you say how they were set, if you're speaking to goals, is that what you mean?

Q. Yes.

A. What goals were established for inventories pre 1986?

Q. Yes.

A. That was not the – the business units didn't come into existence until 1985, late 1984, beginning of 1985. At that time, return on assets [p. 131] became a clear area of goal setting and financial measurement and management. And there was a lot more energy and visibility

around that subject, asset management, in the 1985 period. So, inventory levels I would have to say, inventory levels became more visible at that period of time.

Prior to that, there always was interest in inventory obviously. You know, in business you are interested in inventory. But I think the energy level went up in 1985 because of return on asset.

Q. At CESD, how did you deal with this new emphasis of return on asset, what did it mean at CESD?

A. Well, in my prior position as field manager of Service, I had been very interested in field inventory, meaning the inventory that was out there with service reps in the trunks of cars and in district stocks.

Q. Which was substantial, was it?

A. Yes, it is substantial. I had great interest in that because I was managing a field operating organization. And we had some measures on inventory and tried to control inventory per [p. 132] unit, inventory per copier. And we attempted to drive that down.

And in so doing, what was happening was that some of those parts were being sent back to the main Parts Services organization.

Q. Rather than being in the trunks of cars or –

A. So we were really suboptimizing that, in that we were squeezing that field inventory down, but we were really just moving it around. And it came back over here in Parts Services.

And when the business units came into play, everyone began to ask better questions about the business,

because managers began to look at the total business as a business rather than looking at functional pieces of the business.

Q. When you say "the total business," that is, for example, the total Copier Products business or the total BISD business?

A. Yes, the total Copy Products business. And the questions got a lot better. And the performance measurement got a lot better. And that's when the emphasis on managing overall inventory became very clear, and the fact that our [p. 133] inventory position was high, still is to some extent. But we continue to want to drive that total inventory down.

Q. Who determines what the inventory is at CESD with regard to Copier Products replacement parts?

A. Who determines what it is or what it should be?

Q. What it is.

A. Well, that's a measurement – that's strictly both a physical inventory exercise which takes place which is counting parts, that's done on an audit basis routinely, and an accounting method of measuring what does your accounting system say you have.

Now, that's the what is. Now, what should be –

Q. I included in what is what's ordered. If you have, if you will, one gross of parts, whether you order

another gross or whether you let that one gross deplete. When I say what it is at any given point of time –

A. Oh, I am sorry.

Q. Yes.

* * *

EXHIBIT I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al.,	:	No. C871686 WWS
Plaintiffs,	:	
-against-	:	
EASTMAN KODAK COMPANY,	:	
Defendant,	:	

DEPOSITION UPON ORAL EXAMINATION OF:

Lynn M. Gleason

LOCATION: Rochester Plaza
70 State Street
Rochester, New York 14614

DATE: December 10, 1987

TIME: 9:44 a.m.

REPORTED BY: MARIA A. WOLCZYK, CSR, RPR
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 19] LYNN M. GLEASON– DX BY MR. HENNEFER is that correct?

A. Yes.

Q. You were a specialist in Customer Technical Services; is that right?

A. Yes.

Q. And what did you do as a specialist in Customer Technical Services?

A. I dealt with pertinent business issues that affected our marketing field personnel, answered questions for them on various business-related subjects

Q. Is that a part of CES?

A. No, it's not.

Q. What division is it under?

A. You would classify it as Marketing.

Q. When you say business-related questions were answered, what do you mean by business-related questions? Can you give me an example?

A. Yes, I can give you many examples.

Q. Would you give me a couple just so I get an idea of what you were doing in that position?

A. Sure. If a sales rep, for example, had a question on how to order an alteration for a [p. 20] piece of equipment, they would call in to Customer Technical Services and ask, you know, "Where do we go? Who do we call? What do we do?"

Q. So you were sort of technical, you would tell them what to do or where to go?

A. I told them where to go.

Q. Rather than actually answering the question?

A. Well, it just depended on what the subject matter was.

Q. Sometimes you would answer the question, you provided technical support as well?

A. Yes.

Q. And that was with regard to what kind of machines?

A. Ektaprint copiers.

Q. All Ektaprint?

A. Yes.

Q. You are an Ektaprint specialist?

A. Yes.

Q. And do you have any experience in any other equipment?

A. No.

Q. None at all, aside from your IBM [p. 21] computer?

MR. WALL: You mean have her job responsibilities dealt with any other Kodak equipment other than copiers?

MR. HENNEFER: Yes.

A. No.

Q. From 1983 through 1987 you were with CES as a business specialist; is that correct?

A. Yes.

Q. And what did you do as a business specialist with CES?

A. Dealt with business-related issues that affected our field service people.

(There was a pause in the proceeding.)

Q. You said as a business specialist at CES you were involved in answering business-related questions. Can you give me an example of what business-related questions you dealt with at CES in the 1983 through 1987 period?

A. I dealt a lot with terms and conditions of contracts, service contracts that we offered. And if, for example, a service manager or one of our field management people would call in to ask if – they very rarely would read the terms and [p. 22] conditions of the contract, so they would call in for just interpretation purposes.

Q. When you say terms and conditions of contracts, you are talking about EMA contracts on Ektaprint solely or were there other terms and conditions on contracts that you dealt with?

A. Terms and conditions for equipment maintenance agreements on Ektaprint copiers only.

Q. Only. Did you deal with terms and conditions of CES Parts Services, parts catalog terms or sales of parts, anything like that?

A. That was not part of my job responsibility.

Q. As a business specialist in CES, was that position reorganized in the reorganization that took place in the late '84, early '85?

A. To a certain degree.

Q. What I'm trying to ask you, there was a group within CES that was divided into Copy Products and divided into BIS, as I understand it, in late 1984 or early 1985.

Were you, at that time, put in the group at CES that dealt with Copy Products?

A. Yes.

* * *

[p. 30] Q. In what position with Kodak did you first become familiar with what Kodak's policy with regard to sale of copier parts was?

A. When I became involved with CES.

Q. Okay. That would have been in or about 1983; is that correct?

A. It was after I got involved with CES.

Q. Which was about 1983; is that correct?

MR. WALL: He's just pinning down that your involvement with CES was in 1983.

A. Correct.

MR. WALL: Not necessarily your involvement with that issue at that time.

THE WITNESS: Right. That's what I was trying to make clear.

Q. And how did you become familiar with that?

A. With what?

Q. With Kodak's policy with regard to replacement parts?

A. Through discussions with people in CES.

Q. With whom did you discuss this?

A. With my management.

Q. And what was your understanding when you [p. 31] first became aware of Kodak's policy with regard to replacement parts for copiers of what that policy was?

A. That we sell parts to our direct Copy Products customers who have purchased equipment from Kodak.

Q. Only?

A. And to internal Kodak people, you know, field engineers.

Q. To those groups only?

A. Yes.

Q. What was your understanding of the reasons for this policy?

A. To make sure that we protect our own assets, to make sure that we maintain our quality of service that we are providing to our direct customers.

Q. When you say "to make sure we protect our own assets," what did you mean by that?

A. Our assets being our equipment, to make sure that we continue to provide the quality service that we have since the beginning of the program.

Q. Did it deal with preventing third [p. 32] parties from maintaining the equipment as well?

A. No.

Q. Was this policy, in or about 1983 when you first learned about it, in writing?

A. Not that I'm aware of.

Q. You never saw anything in writing about that when you first came to CES?

A. No.

Q. Okay. Do you know whether that was conveyed to customers or people who were buying parts for Kodak Ektaprint copiers?

MR. WALL: I take it you are asking whether it had been conveyed?

MR. HENNEFER: Yes, in or about 1983.

A. I don't know.

Q. You don't know?

A. No.

Q. Do you know in 1983 or 1984 of any communications, letters or verbal communications that went out to customers with regard to this policy?

A. I'm not sure.

Q. When you say you're not sure, does that mean you don't know of any or you are not sure

* * *

[p. 41] Q. Are you aware of CES's replacement parts principles that are part of the parts catalog?

A. No.

Q. Have you ever been aware of them?

Let me show you what I'm talking about here.

(There was a pause in the proceeding.)

Q. First let me ask you whether you are familiar with the CES parts catalog? Are you?

A. I have never seen one.

Q. They are on fiche and given out to customers who order parts from CES. Are you familiar with that?

MR. WALL: That's not true. They have to buy it.

MR. HENNEFER: Well –

MR. WALL: You can order it.

MR. HENNEFER: Well, given out at a cost, if you will.

MR. WALL: But the implication of your question is buy a part, get a catalog.

MR. HENNEFER: Get a catalog, buy a part.

MR. WALL: Right. That's the way it [p. 42] worked.

Q. Do you understand what I'm talking about, the parts catalogs?

A. I understand what you are talking about.

Q. And were you familiar with the parts catalogs, have you ever looked at one or used one?

A. No.

Q. No. You have never used a parts catalog?

MR. WALL: Go ahead and answer.

A. No.

Q. Okay. You never used a parts catalog while you were at CES or were familiar with one?

MR. WALL: Both those questions have been asked and answered.

MR. HENNEFER: I guess I just find it hard to believe the answer.

MR. WALL: Well, that's too bad. I don't find it hard to believe at all.

MR. ROMEYN: Since none of the witnesses so far have ever seen that.

MR. WALL: The only people who have seen that apparently are your clients.

MR. HENNEFER: It seems a little [p. 43] incredible that someone working at CES is not familiar with the

catalog at all that contains the parts that people buy from CES.

MR. WALL: Frankly, that shows that you have very little understanding of the CES organization. I would be surprised if five percent of the people in CES knew of that replacement parts principle.

MR. HENNEFER: It's a little like a lawyer saying he practiced in Federal Court and never seen Fed. Sup. or Fed. 2nd.

MR. WALL: It's nothing like that.

MR. HENNEFER: Tools of the trade.

MR. ROMEYN: It's not the Bible.

Q. Were you ever aware or would you participate in any discussions about the revision of either the replacement parts principles or the terms of sale that are in the catalog?

A. I don't understand the question.

Q. I'll ask you, were you aware in 1985 and 1986 that the terms of sale under which replacement parts were sold for Ektaprint copiers were changed?

A. No.

* * *

[p. 50] do anything besides keeping them informed of Kodak's policy with regard to servicing of broken equipment?

A. No.

Q. Did Kodak keep track of the development of third-party servicers with regard to Ektaprint copiers?

A. Yes.

Q. Did you participate in keeping track of the development of third-party servicers for Ektaprint copiers?

A. I need a clarification for that question. "Development," I don't know what that means.

Q. During the period from 1985 when you first became aware of third-party servicers for Ektaprint copiers through the present, have a number of businesses either begun or been more active in the marketplace in the servicing of Ektaprint copiers, from your knowledge?

A. Yes.

Q. When I speak of development of third-party servicers, I'm speaking of new businesses and existing businesses getting [p. 51] larger. That's what I'm referring to when I say develop.

Do you understand that?

A. Yes.

Q. Okay. Did Kodak keep track of the development of third-party servicers in Ektaprint copiers?

MR. WALL: I object to the question insofar as it asks the witness to speak to what Kodak as an entity has done. If you want to ask her what she has done or what people of whom she is aware has done, that's fine.

MR. HENNEFER: The objection is noted. But if she did it or she has knowledge of somebody at Kodak

doing it, Kodak was doing it because they are agents and employees of Kodak. And I think it's being obstructionist.

MR. WALL: That's a legal position. If you want to ask the question in another way, we'll move on and you won't have to waste time.

MR. HENNEFER: Do you want to read the question back?

(The reporter read back the pending question.)

[p. 52] A. Yes.

Q. And did you participate in keeping track of the development of third-party servicers in Ektaprint copiers?

A. Not with the way you describe the word development, no.

Q. What did you do with regard to gathering information on third-party servicers of Ektaprint copiers?

A. My involvement was strictly to determine when a part order was placed through Parts Services and there was a question as to whether the individual placing the part order was a direct customer of Eastman Kodak Company or was not a direct customer, I would have that determined and would keep a list of those requests, to my knowledge, to make sure that I knew what was going on.

Q. And who made those requests?

A. What requests?

Q. The requests you have just described?

MR. WALL: Which ones? She described two.

Q. The requests for parts.

[p. 53] A. Various companies throughout the United States.

Q. Did you keep track of the companies that made the requests for parts for Kodak Ektaprint copiers?

A. Yes.

Q. Okay. And kept track specifically of the ones where they were not direct purchasers?

A. I kept track of all requests, regardless of whether they were direct purchasers or not.

Q. You kept track of requests even of people who were entitled to buy Ektaprint parts; is that correct?

A. Yes.

Q. And you kept special track of those?

A. I kept track of them.

Q. Did you make any special effort to keep track of those who requested Ektaprint parts who were not purchasers directly from Kodak of Ektaprint copiers?

A. I noted them on a different list.

Q. Why did you note them on a different list?

A. So I could keep track of who we sold [p. 54] parts to and who we hadn't sold parts to.

Q. And who was entitled to buy those parts and who was not?

A. Yes.

Q. Why did you keep on a special list, on a separate list, if you will, track of the individuals who asked to purchase parts for Ektaprint copiers but who were not entitled to do so?

A. So when Parts Services called me and said that so and so had called and had called already, I could very easily refer to the list and say, "Oh, yes, here it is," instead of going through a larger list. Just to be able to answer more quickly.

Q. And why would Parts Services call you to inquire about that?

A. Because I made the direct contact with the field to determine whether someone was a direct customer or not. They very rarely would call.

Q. Do you know what other uses were made of the list?

A. No.

* * *

[p. 56] half.

MR. WALL: Okay.

(The proceeding recessed at 10:57 a.m.)

(The proceeding reconvened at 11:09 a.m.; appearances as before noted.)

LYNN M. GLEASON, resumes:

DIRECT EXAMINATION BY MR. HENNEFER CONTINUING:

(The reporter read back the last three questions and answers.)

Q. Were you aware of any claims by third-party servicers of Ektaprint copiers that they had been able to purchase parts for those copiers in the past?

MR. WALL: From Kodak?

MR. HENNEFER: From Kodak.

A. Yes.

Q. Okay. And who made such claims to you?

A. Paul Hernandez.

Q. Any others?

A. Not that I can recall.

Q. Was any effort made to investigate whether those claims were true?

A. Yes.

[p. 57] Q. And did you conduct that investigation, were you aware of the results?

A. Yes.

Q. Did you actually conduct the investigation?

A. No.

Q. Who did?

A. Parts Services.

Q. And they reported back to you?

A. Yes.

Q. And what did they report?

A. That Hernandez had purchased a variety of parts from Parts Services.

Q. For the Ektaprint?

A. Not just Ektaprint copier parts.

Q. But had he purchased Ektaprint copier parts as well from Parts Services?

A. Yes.

Q. And was an investigation made as to why Parts Services sold those parts to him?

A. Yes.

Q. Did Parts Services make that investigation?

A. Yes.

[p. 58] Q. Okay. Did they report the results of that investigation to you?

A. Not directly to me, that I can recall.

Q. Did you learn of the results of that investigation?

A. Yes.

Q. Who did they report it directly to?

A. I don't remember.

Q. What were the results of that investigation?

MR. HENNEFER: The record should reflect the length of time, pause.

MR. WALL: Well, the record will reflect that the witness is trying to think of a thoughtful answer to the

question. And I object to the tactic. You are trying to put pressure on the witness to answer quickly and I object to it.

MR. HENNEFER: No, I'm not. I just want the record to reflect that after many of the questions, we are talking not a few seconds, but minutes pause.

MR. WALL: We are not talking minutes. There hasn't been a question yet when the witness has paused for minutes.

[p. 59] MR. HENNEFER: The last one was two or three minutes.

MR. WALL: That is flatly untrue.

MR. HENNEFER: I was looking at my watch.

MR. WALL: The witness will take as long as she wants to answer.

MR. HENNEFER: She can. She can.

MR. WALL: What's the relevance if she's taking time to think about it? Tell me the relevance.

MR. HENNEFER: I will tell you. We have scheduled one day for these depositions and we have a good deal of information we want to cover in connection with the summary judgment motion. And if I have to make an application for additional discovery, the record should reflect how difficult it has been, certainly in the first day and in this day, to cover material. That's the relevance.

MR. WALL: Fine, that's your position. I'm not going to address your position now, even though I disagree with it, because I don't want to take the time and you shouldn't either.

[p. 60] MR. HENNEFER: Fine. You asked me for it. That's why I gave you an answer. If you want to rebut it and take the time, you can. You asked for that relevance. I gave it to you.

MR. WALL: Let's go. Would you like the question read back? Why don't we do it, have the question read back, at the risk of taking any more time.

(The reporter read back the pending question.)

A. I don't believe that I can give you all of the results of that investigation.

Q. Do you recall anything about what that investigation turned up?

A. Yes.

Q. Okay. Would you tell me just what you recall?

A. That the majority of the parts that Hernandez had ordered from Kodak were micrographics parts.

Q. Did it turn up that he had ordered some Ektaprint copier parts?

A. Yes.

Q. And that they were sold to him?

[p. 61] A. Yes.

Q. Did the investigation address why they were sold to him by Parts Services?

A. The question was asked of Parts Services, and I don't really honestly remember the answer.

Q. You don't remember whether they addressed that or not?

MR. WALL: It's not what she said. She said she didn't remember the answer.

A. I don't remember the answer.

Q. Were you aware whether or not, other than the situation with Paul Hernandez, third-party service organizations had been able to receive from any source parts for Kodak Ektaprint copiers?

A. I don't know if they have received them from any source.

Q. Were you aware that they had parts with which to service Ektaprint copiers?

A. They would have to have parts if they were servicing Ektaprint copiers.

Q. So you were aware that they had parts with which to make service on Ektaprint copiers?

[p. 62] MR. WALL: That was your understanding, wasn't it?

A. I was aware that there were parts available for installation into those Ektaprint copiers.

Q. And from what sources were you aware they were available, other than purchased directly from Eastman Kodak company?

A. I don't know. The customers could have purchased the parts directly from us.

Q. Yes. I was asking for sources other than directly from Eastman Kodak Company?

A. I don't know.

Q. You don't know?

A. No.

Q. Was there any thoughts that were expressed at Kodak as to where these parts were coming from, other than directly from the Eastman Kodak Company?

A. Can I have the question read back?

(The reporter read back the pending question.)

A. From vendors that provide Kodak with parts.

[p. 63] Q. Okay. And what information did you have with regard to these parts coming from vendors who provide Kodak with parts?

A. That attempts had been made to purchase parts through vendors, and that if the parts are proprietary to Kodak, that the vendors refer the request back to Kodak. And if it's non-proprietary parts, that they will sell parts to anyone, I guess.

Q. And you had information that third-party servicers of Ektaprint copiers actually obtained these parts through these parts vendors?

A. No.

Q. You didn't have any information about instances where the vendors had actually supplied parts to third-party servicers of Ektaprint copiers?

A. Not to my knowledge.

Q. Now, were you aware at Kodak that there was a concern that third-party servicers of Ektaprint copiers were receiving parts?

A. From where?

Q. From sources other than directly from Kodak.

[p. 64] A. Could you read the question back?

(The reporter read back the pending question.)

A. I would like you to repeat the question.

Q. Was there a concern that third-party servicers were able to get parts other than directly through Kodak for Ektaprint copiers?

A. No.

Q. Kodak was not concerned about where they were getting parts?

MR. WALL: Outside of Kodak?

A. Outside of Kodak?

Q. Yes. Outside directly from Kodak.

A. No.

Q. You have to respond.

MR. WALL: She said no.

MR. HENNEFER: She was shaking her head.

MR. WALL: She said it while you were speaking.

THE WITNESS: I said it while you were speaking.

MR. HENNEFER: It wasn't audible, I couldn't hear it.

[p. 65] MR. WALL: I did.

A. Sorry.

Q. Were you aware of any steps that had been taken at CES before 1985 to prevent parts from being sold to third-party servicers of Ektaprint copiers?

MR. WALL: Could I have that read back, please?

(The reporter read back the pending question.)

A. No.

Q. Were any steps taken after 1985?

MR. WALL: Were any steps taken after 1985 to prevent them from getting Kodak parts?

ME. HENNEFER: Right.

MR. WALL: Through Kodak?

MR. HENNEFER: I will repeat the question. It came from the former question, but I'll have to repeat it every time.

Q. Were any steps taken after 1985 to try to prevent third-party servicers of Ektaprint copiers from obtaining parts from any source?

MR. WALL: Other than Kodak?

MR. HENNEFER: Any source, including [p. 66] Kodak or other sources.

A. No.

Q. Were you aware at any time while you were with CES of people expressing problems with third-party service of customer's Ektaprint copiers?

A. What do you mean by "problems"?

Q. Problems with quality or response time or cost of service rendered by third-party servicers to Ektaprint copiers?

A. Yes.

Q. What problems were you aware of?

A. In general conversation with people in CES in the field on the West Coast, there were mention of customers that were just coming back to Kodak for service, in general. I don't have any specifics for you. But in general conversations, people that were not totally satisfied with service that they received from outside of Kodak.

Q. Do you remember the reasons why they expressed dissatisfaction with third-party service of Ektaprint copiers?

A. No.

Q. Do you recall any complaints with regard [p. 67] to the quality of the training of technicians used by third-party servicers regarding Ektaprint copiers?

A. No.

Q. With regard to parts suppliers for Ektaprint copiers, do you recall any pressure on parts suppliers by Kodak not to sell parts to third-party servicers for Ektaprint copiers?

A. No.

Q. Were you involved in any way with the setting of levels of inventory for Ektaprint copier parts at CES?

A. No.

Q. Were you involved in any discussions regarding the pricing of copier parts for Ektaprint copiers in CES?

A. Could you repeat the question?

(The reporter read back the pending question.)

A. Yes.

Q. What aspects of the pricing were you involved in discussions on?

A. General discussions about price increases and price decreases and just historical

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[p. 71] don't have any knowledge."

THE WITNESS: Please, repeat the question.

(The reporter read back the pending question.)

A. A few service modules have been sold.

Q. Are you aware of the circumstances under which those were sold?

A. I wasn't involved in the sale of the service modules.

Q. Are you aware from other sources how those service modules were sold and why?

A. I don't recall the details around the selling of those service modules.

Q. Okay. Can self-servicers buy parts for Ektaprint photocopy machines to be installed by a third-party service organization?

A. Can you repeat the question?

(The reporter read back the pending question.)

A. A customer who is servicing their own equipment can buy parts from Kodak, period.

Q. And when you say "period," you mean, don't you, that they have to put them in their own [p. 72] machine?

A. Yes.

Q. But they can be put into their machine by a third party; is that correct?

MR. WALL: You are asking as a matter of policy?

MR. HENNEFER: Yes, right.

MR. WALL: He's not asking you whether –

MR. ROMEYN: It's theoretically possible.

MR. WALL: – it's theoretically possible. Whether as a matter of policy Kodak will sell to a customer so that they may have an independent service organization service that customer's machine.

A. Well, that's not consistent with self-servicing.

Q. Is that what Kodak's policy is?

A. I would like some clarification on the question.

Q. I think your counsel stated it well, and the question is this.

Is it Kodak's policy to allow sale of [p. 73] parts to self-servicers where those parts, to the knowledge of Kodak, will be put into the Ektaprint copier by a third-party service organization?

A. I'm not aware of such a policy.

Q. Is it Kodak's policy that parts cannot be sold to self-servicers where those parts will be put into an Ektaprint copier by a third-party service organization?

A. No.

Q. There is no policy on that one way or the other, that you're aware of?

A. This is confusing. I guess I don't understand –

MR. WALL: Counsel, I think it would help. What you are really asking is about an application of the replacement parts policy to a particular situation. But I think the witness is being confused because you are asking her whether there is a policy that has been set for that situation.

MR. HENNEFER: I am asking whether a policy applies to this situation. And, you know, if you want to get into a semantic game of whether the policy applies or the policy states it [p. 74] directly or indirectly or whether it implies or can be inferred from –

MR. WALL: I don't view that as a semantic difference at all. You may, but it's causing come confusion. It's your deposition, you can clear the confusion very easily.

MR. HENNEFER: I don't believe the confusion is in the question but I'll restate it differently if it will help.

Q. Are you aware of any policy that either addresses directly or that by implication says that self-servicers can or cannot buy parts to be installed in their Ektaprint copier by a third-party service organization?

A. No.

Q. Okay. Are you aware of any self-servicers, that is people who have bought Ektaprint copiers directly from Kodak?

MR. WALL: Direct customers.

MR. HENNEFER: Right, you call them direct customers.

Q. Are you aware of any –

MR. WALL: It may be different than the previous question. But he'll ask this one.

[p. 75] MR. HENNEFER: Okay, strike that.

Q. Are you aware of any direct customers for Ektaprint copiers who are buying parts for Ektaprint copiers from Kodak and reselling those parts to others?

A. No.

Q. Does Kodak have a policy that addresses what would happen if somebody did that?

A. Yes.

Q. What is that policy?

A. We wouldn't sell them parts.

Q. They would be terminated from being able to buy parts; is that correct?

A. Because we don't resell –

Q. Allow reselling?

A. Allow reselling of parts. We sell them directly to our Copy Products customers.

Q. Yes, right. Has that ever occurred –

A. Not that I know.

Q. –to your knowledge?

A. Not that I know.

Q. Have you heard discussed or discussed with anyone at Kodak whether or not Kodak's policy to not sell parts for Ektaprint copiers to [p. 76] third-party servicers would affect the cost of service, whether from Kodak to third-party – or third-party servicers to owners of Ektaprint copiers?

MR. WALL: Could I ask that be read back?

(The reporter read back the pending question.)

MR. WALL: There's something in that question about service to Kodak third parties.

MR. HENNEFER: Kodak or third parties is I believe what I said, from Kodak or third parties, service from Kodak –

MR. WALL: Could you just simplify it and try it again?

Q. Have you ever heard discussed that the failure to sell parts to third-party service companies for Ektaprint copiers would prevent competition and lower prices in service?

A. No.

Q. Have you ever heard discussed whether the lack of competition for service of Ektaprint copiers would result in lower values of used machines?

* * *

[p. 79] A. Generally through discussions with sales reps, but that's how you would know.

Q. Okay. Did Kodak keep track of what specific models of Ektaprint photocopiers were owned by the direct purchasers that they identified?

A. Yes.

Q. And did they match up the models, if possible, with the parts that were being ordered for those copiers?

MR. WALL: On a routine basis?

MR. HENNEFER: Yes.

A. No.

Q. So, if I had a 150AF that I had purchased directly from Kodak, could I order a part that was exclusive and unique to a 300?

MR. WALL: Again, you are talking now on a broad policy level.

MR. HENNEFER: Yes, policy or practice.

A. Most likely.

Q. When you say "most likely," what do you mean by that?

A. I don't have any knowledge that you would not be able to buy that part.

* * *

[p. 93] another customer.

Q. Had that always been the case?

A. To my knowledge.

Q. If it were sold to another customer, had Kodak been servicing those pieces of equipment?

A. In what time frame?

Q. From the time you were with CES on?

A. To my knowledge, yes.

Q. Did the availability of third-party service make it easier for customers to sell used equipment and get that equipment serviced without having to come back to Kodak and go through an inspection and certification or remanufacturing process?

Do you want to have her read that back?

MR. WALL: Please do so.

(The reporter read back the pending question.)

A. I don't know what the ISOs' policies were, so I can only speak for our practices.

Q. Okay. In the letter of October 5, 1985, you state that "This letter is to familiarize you with our current business practices." Why did you refer to these as the current business practices? [p. 94] Had they changed?

A. In what letter?

MR. WALL: August 5.

THE WITNESS: He didn't say August.

MR. HENNEFER: I believe I said August 5, 1985.

A. You said –

MR. WALL: In any event, this is it.

A. That's just the way I write. Current business practice is the way I chose to –

Q. Refer to it?

A. Refer to it.

Q. You weren't distinguishing them from past business practices or business policies?

A. No.

Q. In the fourth paragraph of the August 5, 1985 letter, you refer to Kodak's desire to offer EMAs even though Kodak has no obligation to service the copiers.

Do you know why Kodak chose to offer service to brokered Ektaprint copiers as opposed to not offering any service at all?

A. We wanted the service revenue.

[p. 95] Q. Were there any other reasons you were aware of?

A. No.

Q. With regard to the fifth paragraph in the August 5, 1985 letter, in the second sentence you say, "The current business practice of Copy Products is to make all necessary parts, tools, training and service literature available at established prices to direct Copy Products customers of Kodak who want to service their own copiers."

Again, when you are saying current business practices, that's just your way of writing?

A. Yes.

Q. It doesn't in any way reflect that the practice may not have been the same in the past?

A. No.

Q. And you have underlined their own copiers to put emphasis on that. Is that to distinguish it from any customer who might want to service a copier of others, be a third-party copier servicer?

A. Yes.

[p. 96] Q. Also to underline the fact that self-servicers shouldn't sell those parts?

A. That wasn't the idea at the time, that I can recall. I just wanted to point out to the field that if they wanted to service their own copiers, we would sell them parts.

Q. On page 2 of the August 5, 1985 letter, you say, "It is important that we be consistent in our communications and implementation of the attached guidelines."

Why do you stress that it's important that you have consistency? Was that because there was some inconsistency in the past?

A. No.

Q. You are aware of no inconsistencies?

A. Not that I can recall.

Q. When you say "implementation of the attached guidelines" in that first sentence of the second page of the August 5, 1985 letter, do you mean to imply that they were being implemented for the first time?

A. It doesn't say that.

Q. No, it doesn't say that. But what I'm asking you, are you implying that these guidelines [p. 97] are being implemented for the first time, that there were no prior guidelines?

A. I don't believe there were prior guidelines in writing.

Q. This is the first time somebody had sat down, to your knowledge, and set out the guidelines in these areas; is that correct?

MR. WALL: In writing.

MR. HENNEFER: Yes.

A. Yes.

Q. Had they been set out verbally before?

A. I don't know.

Q. To you knowledge, had they?

MR. ROMEYN: Off the record, Jim.

(There was a discussion off the record.)

MR. WALL: Let's get the question straight. When you are saying "had the guidelines," are you referring to the entire guidelines that cover two different subjects or any portion thereof?

MR. HENNEFER: I'll ask the question.

Q. To your knowledge, prior to 1985, had the guidelines that you are promulgating by the August 5, 1985 letter, with regard to broker sold [p. 98] equipment and third-party service organizations, been set out to the field to be implemented verbally?

MR. WALL: Do you understand the question?

THE WITNESS: No. There's two separate issues and that's what – I don't know what he's getting at.

MR. WALL: Counsel, maybe you could break it down.

MR. HENNEFER: I will.

Q. Had the guidelines that you were putting out with this August 5, 1985 letter, with regard to broker sold equipment, been put out to the field for implementation verbally prior to August 5, 1985?

A. I don't know.

Q. Had you done so?

MR. WALL: Again, I have to ask you to clarify one thing. Are you excluding from this conversations she may have had with individual field representatives and limiting it to some sort of a broader policy?

MR. HENNEFER: Either way, whether she [p. 99] did it with several separately or whether she did it to all of them in one large convention of Kodak reps.

MR. WALL: Under your construction of the question, if she had a single conversation with a single field person, that would be a yes answer. Okay.

MR. HENNEFER: Let me break it down. I will ask a series of questions, if one will not suffice.

MR. WALL: Which apparently won't, no.

Q. Prior to August 5, 1985, had you discussed with various field representatives around the country what the guidelines were to be with regard to what you term "broker sold equipment"?

A. I had conversations with people about the subject before this letter was issued.

Q. Were those conversations based upon guidelines that had already been set up, or were you, if you will, searching to set up what the guidelines should be?

A. We are talking about the way to handle broker sold equipment.

[p. 100] Q. Service to broker sold equipment. When I say "broker sold equipment," I'm referring to the category in this letter that is so entitled, and I mean service to broker sold equipment.

A. That's right.

Q. Do you want the question read back?

A. Yes.

(The reporter read back the pending question.)

A. From what I can recall, we talked about the way to handle it, not how to handle it – not asking them, soliciting them for information on how to handle it. We were talking about this is the way you handle a piece of equipment.

Q. What I'm trying to ask you is with regard to servicing of broker sold equipment prior to the August 5, 1985 letter, did you have fixed in you mind a set of guidelines or –

MR. WALL: Maybe we can get away from the word "guidelines." Did she have a policy in mind to follow.

Q. Were you following a specific policy that included in that policy what you set out after the August 5, 1985 letter as specific [p. 101] guidelines or were these something new?

A. These were something new.

MR. HENNEFER: Do you want to take a lunch break and come back after lunch? We are at 12:30.

MR. WALL: 1:30?

MR. HENNEFER: 1:30 is fine.

(The proceeding recessed at 12:32 p.m.)

(The proceeding reconvened at 1:35 p.m.; appearances as before noted.)

LYNN M. GLEASON, resumes:

DIRECT EXAMINATION BY MR. HENNEFER CONTINUING:

(The reporter read back the last question and answer.)

Q. With regard to the guidelines that were set out in connection with the August 5, 1985 letter regarding third-party service organizations and parts, were there prior written or oral guidelines or were these new guidelines that were being set out?

MR. WALL: I believe that's asked and answered.

MR. HENNEFER: No. The previous

* * *

[p. 108] A. That's correct.

Q. And what other information is on there, besides the customer's name, the type of equipment, whether he's on an EMA or per call?

A. The service history on the equipment.

Q. Okay. Is there any other information?

A. I'm sure there is some information in addition to that. But those are the pertinent things that are maintained.

Q. In the guidelines at paragraph 6 it makes reference to a flat rate pre-installation inspection fee. Do you know how the amount of that flat rate pre-installation inspection fee was determined? And for your reference, I think there's a schedule of them three pages back; is that correct?

A. Yes.

Q. Okay. Do you know how that was determined, on what basis?

MR. WALL: How particular fees were determined?

Q. Yes, exactly, that schedule or the fees.

A. Yes.

[p. 109] Q. How was that?

A. There was an estimate of how much time it would take to actually inspect a certain model of equipment. And that amount of time was multiplied by the burden hourly rate that we actually established for our field engineers. And we simply multiplied the two and came out with a fee per configuration.

Q. Did these fees initially set in October of 1985 –

MR. ROMEYN: August.

A. That's the second time.

Q. I am sorry. – August, 1985, turn out to be accurate or were they subsequently revised?

MR. WALL: Turn out to be accurate? What do you mean by that?

MR. HENNEFER: In terms of an estimate of what it would cost.

MR. WALL: Were they an accurate estimate?

MR. HENNEFER: Yes.

MR. WALL: The question is whether they were an accurate estimate of what it would cost to inspect these various types of machines.

[p. 110] A. I don't know.

Q. When you say you don't know, you don't know whether this actually stood up under the test of time to what you had estimated it would cost for labor, travel time, the cost of a starter kit? And when I say labor, travel time and the cost of a starter kit, I'm reading from the sixth paragraph there.

A. Could you read the question back?

(The reporter read back the pending question.)

A. That's correct.

Q. Were these subsequently revised?

A. Yes.

Q. And how many times were they revised from August of 1985 until you left CESD, which was this year, 1987?

A. I think once.

Q. Okay. And do you remember when that was?

A. Not specifically.

Q. Was it in 1987?

A. I don't think so.

Q. You think it was in 1986?

[p. 111] A. Yes.

Q. And do you recall how they were revised?

A. They were increased.

Q. Were they increased for every model or were they increased to a flat rate for all models?

A. They were increased to give a flat rate for mid volume equipment, a flat rate for high volume equipment and a flat rate for duplicator equipment.

Q. When you say for mid volume equipment, what models are you including in mid volume equipment?

A. 85 and IM40.

Q. And for high range?

A. 100, 150, 200, 225, 235.

Q. And when you say duplicator, you are referring to?

A. 250 and 300.

Q. What is the distinction between a copier-duplicator and a duplicator, if there is one?

A. Just the volume of equipment that it's expected to – the volume of copies that it's expected to put out on a monthly basis. It's just [p. 112] a differentiation in market segment.

Q. So there's a differentiation in as you refer to the market segment – standing objection – between the high volume which you call a copier-duplicator, is that correct, and the duplicator?

MR. WALL: For purposes of using that term within Kodak?

MR. HENNEFER: Right.

MR. ROMEYN: I lost the question.

MR. WALL: He's asking you whether Kodak's usage of duplicator versus copier-duplicator is distinguished based upon the volume of copies that a machine makes.

A. That's correct.

Q. And the only thing that qualifies as a duplicator because of its very high volume is the 250 and 300?

A. That's correct.

Q. And that is common parlance in Kodak, is it?

A. Yes.

Q. That's what people say?

A. Yes.

[p. 113] MR. WALL: It's not exactly made into a trade name or a protected name.

MR. ROMEYN: It's not protected. Off the record.

(There was a discussion off the record.)

Q. Do you recall what the increases in the flat rate pre-installation inspection fee were raised to for mid range copier-duplicators and duplicators?

MR. WALL: What the fees were raised to?

MR. HENNEFER: Yes.

A. Not specifically. I have a ballpark but not specifically.

Q. What is your ballpark, ROM?

A. $1,000 for mid volume, 1,500 for copier-duplicators, and 2,000 for duplicators.

Q. So for a pre-installation inspection fee for a Kodak Ektaprint 100, 150 copier-duplicator, the fee was raised from $250 to $1,500; is that correct?

A. That's correct.

Q. And the pre-installation inspection fee for a Kodak Ektaprint 250F duplicator, the fee was [p. 114] raised from $640 to $2,000; is that correct?

A. It's not correct.

Q. 250F was from 515 to 2,000; is that correct?

A. That's correct.

Q. Why were the raises so substantial?

A. There was a decision made to increase the pre-installation inspection fee because we weren't recovering what it cost us to have a new customer of Kodak's inspected and established as a new customer.

Q. And you were falling that short, that is the difference between what you were charging and what the new charges were going to be, in your estimation?

A. Yes.

Q. What were the costs associated with the pre-installation inspection besides the ones that are listed in the guidelines in paragraph 6, that is labor, travel time and the cost of the starter kit? Were there parts?

A. Field engineers would in most situations find the need to install an image loop, which is our photoconductor.

[p. 115] Q. Is that not included in a starter kit?

A. I don't know.

Q. What is in a starter kit, if you know?

A. Paper, toner, developer, plastic bags, twist ties.

MR. ROMEYN: You asked.

Q. Is there a photoconductor loop?

A. I don't know.

Q. There may be, but you don't know?

A. I don't know.

Q. Okay. What other items that were parts would be installed in a pre-installation inspection fee? Because it was my understanding, maybe this is incorrect, that they didn't install parts during that.

A. What we instructed the field engineers to do as part of the pre-installation inspection fee if they felt it

was necessary was to either install an image loop and/or a fuser roller, which is a part.

Q. What are the approximate costs of an image loop, or the price at which you would sell an image loop or a fuser roller on a per call basis?

[p. 116] A. An image loop is over $100 and less than 200. I don't have a total.

Q. Okay.

A. And from what I can remember, at the time the fuser rollers were over $500 on a per call basis.

Q. Do you know what Kodak's costs on those items was?

A. No, I do not.

Q. Okay. What other parts might be installed in connection with a pre-installation inspection?

A. None, to my knowledge.

Q. Did you find that the fees of 1,000, 1,500 and 2,000 covered the costs that you described or potential costs for labor, travel time, cost of the starter kit and the two specific items of parts that might be installed?

A. No.

Q. It still didn't cover it, was that your experience?

MR. WALL: The question was did she find that?

MR. HENNEFER: Yes.

* * *

[p. 155] just a copy, it says "from Lynn M. Gleason" though?

A. That's correct.

Q. But the initial introductory lines here on the January 30th indicates that it had been sent out as just a copy to –

A. Some field CES people.

Q. Oh, okay. Do you know whether this was the practice, whether this letter that you sent out on January 27, 1987, was subsequently disseminated to the field?

A. That looks as though it was.

MR. WALL: May I see this, please? I just want to look at the dates.

MR. HENNEFER: It's January 30, 1987. It says it's filed 1987-01-30. I was wondering when the pen would drop.

Q. Okay. I would like to ask you a few questions about the January 27, 1987 letter, okay?

The second paragraph of your letter of January 27, 1987, it says "First off, a few reminders on our overall business strategy."

When you say "overall business [p. 156] strategy," who determined what the overall business strategy was in this context?

A. Copy Products management determines business strategies.

Q. So the business strategy put in here was put out by Copy Products management; is that correct?

A. That's correct.

Q. It says at the end of that second paragraph that "Our objective is to continue to provide EMAs on these units and to charge appropriately for the administrative service and support costs involved in handling third-party equipment."

Now, was that objective what you had in mind when the inspection fee was raised in the next paragraph under item 3 to $1,000 for MV copiers, 1,500 for copiers-duplicators and 2,000 for duplicators?

A. Yes.

Q. In item number 2 in the next paragraph it says that "Kodak will perform a pre-installation inspection for ALL" – and all is all in caps – "third-party equipment regardless [p. 157] of the equipment class to determine if it meets Kodak's standards." Was that a change from the prior policy?

A. Yes.

Q. Okay. What had the prior policy been?

A. It had been to perform a pre-installation inspection on the equipment that was going to be covered by an EMA.

Q. Only. And this was instituting it with regard to all equipment, including equipment that was going to be on a per call?

A. That's correct.

Q. And we have discussed item 3, that is correct, where the inspection fee is charged at 1,000, 1,500 and

2,000 directly to the prospective customer and not to a third-party broker?

MR. WALL: We discussed that fee earlier. We didn't discuss the statement in this document.

Q. What is meant by the statement in the document that "The pre-installation inspection fee should be charged directly to the prospective customer, not to the third party"; was that a change in policy?

[p. 158] A. No.

Q. The change in item 3 was in the pre-inspection fee amounts, wasn't it?

A. That's correct.

Q. In paragraph 4 it says in the first line, "If the copier is found to meet Kodak standards, an EMA or service on a per call basis will be offered at current prices."

The change there is that the service on a per call basis will also be offered; is that correct?

A. That's not a change. That first sentence is not a change.

Q. After the copier was found to meet Kodak standards, would you offer an EMA or a per call service on that machine prior to this time, January, 1987?

A. Could you reread the question for me, please?

(The reporter read back the pending question.)

A. The change was whether we were going to charge a pre-installation inspection fee for per call equipment, not whether we would service that [p. 159] unit at current prices.

Q. Per call. What you are saying is you didn't – the prior policy, as I understand it, you did not charge a pre-installation inspection fee if it was going on per call. You were now going to do so; is that correct?

A. That's correct.

MR. WALL: Want to take a break?

MR. HENNEFER: Sure.

(The proceeding recessed at 3:25 p.m.)

(The proceeding reconvened at 3:38 p.m.; appearances as before noted.)

LYNN M. GLEASON, resumes:

DIRECT EXAMINATION BY MR. HENNEFER CONTINUING:

Q. Looking at the letter of January 27, 1987, in the paragraph that begins "If you discover," do you see that?

A. Yes.

Q. At the end of that it says, "If CES determines that remanufacturing is necessary, the customer still has the option to convert to per call without having the unit remanufactured."

Was that a new option?

* * *

EXHIBIT J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs, – against – EASTMAN KODAK COMPANY, Defendant.	No. C87 1686 WWS

DEPOSITION UPON ORAL EXAMINATION OF:
John A. Lacy

LOCATION: Rochester Plaza
70 State Street
Rochester, New York 14614

DATE: January 11, 1988

TIME: 12:06 p.m.

REPORTED BY: MARIA A. WOLCZYK, CSR, RPR
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 15] JOHN A. LACY – DX BY MR. HENNEFER an independent service bureau.

Q. And how would that differ from the DDMS as you have described it?

A. I am afraid I just don't recall. I am sorry, I can't help you there.

Q. Okay. With regard to some or all of the various categories we have reviewed, were there separate and discrete marketing strategies that you worked on or developed, either at BSMD or its successor, BISD?

A. We are in 1985 now?

Q. Yes. Well, during your tenure in either one of those, which I believe started in '79.

MR. PICKETT: The question is whether there's a separate marketing strategy for each or some of these particular categories.

MR. HENNEFER: That's correct, yes.

A. Well, yes and no. These are all interrelated products. When you're selling, for instance, a system, if you want to take that category, it is highly likely that there could be products from every one of these areas included in that system. So, while in some cases there could be a stand-alone product strategy for one of them, [p. 16] for instance if you just upgraded a reader/printer or a microfilmer, you could have an independent sale. But very often, all of them are included in one sale.

So, while we do have groups that work with each one of these areas, they are all definitely closely interrelated.

Q. When you earlier described sales, you spoke about a higher return on sales for cost of the program, or words to that effect.

Did you monitor that with regard to any of these specific categories?

MR. PICKETT: Category by category?

MR. HENNEFER: Yes, right.

A. We monitor sales in each category. We don't – we obviously know what our cost of sales is. But we do not and have not differentiated the specific costs as they might vary for each one of these areas because of the reasons that I talked about. Because of the interaction between the products, it's very difficult to assign a cost to each one of them. So therefore, we use a general cost for our whole division in selling cost and don't differentiate it between products.

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[p. 27] I wouldn't say that that was directly a major cause for the change, but it certainly was a concern of ours.

Q. And was there specific discussion in connection with the April, 1985 BISD policy change on what types of sophisticated equipment could not be adequately serviced by ISOs?

A. Well, as you know, when we put the policy in, we, if you will, grandfathered some of the earlier equipment which was, in many cases, some of the less sophisticated equipment in terms of parts policy. But a lot of the equipment that was coming out in the future was and is quite sophisticated.

Q. Specifically why would the Reliant 1000 be the cutoff point, do you know?

A. That was just a point in time.

Q. And it was felt that the equipment prior to that time was not too sophisticated for ISOs to service; is that correct?

A. No.

Q. But parts were still going to be sold –

A. My answer "no" is I'm not agreeing with [p. 28] your comment, not "no" answering your question.

Q. It was felt then that there was or was not equipment prior to the Reliant 1000, in let's say other areas in retrieval devices or in other systems, that could be handled by ISOs?

A. We didn't sit down and attempt to differentiate which equipment was too sophisticated and which one wasn't. I don't recall us ever sitting down and trying to identify from that point.

Q. It was just a temporal thing?

A. I don't know what that means.

Q. From a time standpoint forward, any equipment that came out was going to be subject to –

A. The cutoff point was time, yes.

Q. You listed as one other factor that you felt would, if you will, debilitate an ISO from giving the quality of service that you wished as training; is that correct, lack of training?

MR. PICKETT: Could you read that back, please?

(The reporter read back the pending question.)

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[p. 32] was was I involved in discussions?

Q. Right.

A. And the answer is no.

Q. The second part of that question would be whether you discussed the possibility that training would be made available to ISOs to update their knowledge for servicing micrographics equipment?

A. Not that I'm aware of.

Q. In your Declaration you list as some of the major competitors of Kodak in the micrographics area Bell & Howell, 3M, Minolta, Canon and Fuji.

Are you aware of what policies these companies have adopted toward the sale of replacement parts?

A. Not specifically, no.

Q. Are you generally aware of any of them?

A. No.

Q. Do you know whether the parts policies of competitors, the ones I've listed: Bell & Howell, 3M, Minolta, Canon and Fuji, were considered in the development of Eastman Kodak's parts policy for micrographics replacements parts [p. 33] in April of 1985 or thereafter?

A. I am not specifically aware of that, no.

Q. Are you aware of what the policies with regard to servicing used machines are for those competitors, Bell & Howell, 3M, Minolta, Canon, Fuji?

A. I am not.

Q. Are you aware with regard to those five listed micrographics competitors of Kodak what their policies are for taking trade-ins of Kodak machines and their equipment?

A. No. I know they take trade-ins, but I'm not aware of their policy and terms.

Q. From your position as the marketing manager at BISD, has it been a consideration in your sales policies what the trade-ins of competitors is for Kodak machines?

A. I am sure that our marketing people look at the trade-in policies in terms of pricing in terms of other vendors. Obviously we are in a highly competitive marketplace and you need to have policies that are consistent with what's accepted in the marketplace.

I personally was not involved in [p. 34] understanding those.

Q. When you say it has to be consistent with the marketplace, what do you mean by that?

A. Well, if everybody is selling a $5,000 automobile and you are going to come to market with a $15,000 automobile that does the same things, you are probably not going to be very successful. That's what I mean.

Q. With regard to trade-in policies, how does that relate?

A. You certainly would want to understand what your competitors were doing in any marketplace. And while you may not necessarily follow what they are

doing, you ought to, I think in any business you need to understand what competitive practices are, to know how to sell against that and understand what you might perhaps want to do.

Q. What are Kodak's practices with regard to accepting micrographics machines of its major competitors, including the five that I've listed, as a trade-in on Kodak machines?

A. We offer modest trade-ins on both Kodak equipment and competitive equipment for like [p. 35] models. In other words, we will take a reader/printer in trade, either ours or a competitor's, for sale of a new reader/printer.

Q. But on like models, you wouldn't take a reader/printer in as a trade-in on a COM system or CAR system?

A. No, to the best of my knowledge we don't do that.

Q. And how are the prices established at which you take trade-ins of either – let's start with Kodak equipment for a new piece of Kodak micrographics equipment?

A. Okay. First we have a – we split it in two for current equipment, that is products that we are currently selling in the marketplace.

Q. Okay.

A. And noncurrent. That is obsolete products. And the trade-in would normally be higher for a current product than it would for a discontinued product.

Q. And how are the levels of those set? Are they set with regard to what those products would fetch in the open market?

A. Well, wait a minute, I want to make sure [p. 36] I understand your question.

Q. Do you want to read it back, or I'll restate it.

A. I would rather have you restate it.

Q. What I'm asking you is how are the prices set at which Kodak will establish a trade-in value for –

A. How do we set a trade-in price?

Q. Yes.

A. Well, like any pricing, a number of factors would be considered. We obviously would want to look at the margin on those products and understand how much margin we would be giving up so we knew that we were still selling those products at a profitable price. So, profit is a strong motivator.

And then again as we have talked about earlier, market conditions, what is judged to be acceptable in the marketplace.

We might also evaluate our current sales position with a particular product. So there could be a number of factors.

Q. When you say you would look at the margin, the profit, what do you mean by that? Can

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[p. 44] MR. PICKETT: New as of when?

MR. HENNEFER: As of the last five years.

MR. PICKETT: Let me go back and have you read the question, please. I think we are getting to markets and after-markets in a sense that may be confusing.

(The reporter read back the pending question.)

Q. From your knowledge of the used micrographics equipment market over the past five years, has there been a substantial increase in the number of these machines available in that market?

A. I would say there has been an increase. I don't know how to quantify substantial.

Q. Was this something that was a common occurrence, the selling of used equipment, in fairly substantial volumes in the 1970's?

A. I would say no. Substantial volumes – again, I don't know substantial. But if you mean is it half the market, the answer is no.

Q. Right. Does BISD or has Kodak estimated what the number of these machines in terms of [p. 45] percentage of market or in raw numbers is?

A. Not that I'm aware of.

Q. In regard to the servicing of used machines, did BISD ever track the number of either EMAs or per call servicing contracts or calls it had on used equipment as opposed to equipment it sold and that had not been resold?

A. I don't understand the question.

Q. Did – I'll restate it.

Did BISD ever attempt to track, prior to 1985, whether the equipment it was servicing was equipment it had sold itself directly to a customer or was a piece of used equipment?

A. Not that I'm aware of.

MR. PICKETT: By "used" you really mean resold?

MR. HENNEFER: Right.

Q. Is that what you understood?

A. Yes.

Q. The attempt has been made since 1985; is that correct, to try to track some of – to track whether the equipment being serviced under an EMA was equipment that had been resold or was bought directly from Kodak; is that correct?

* * *

[p. 83] A. I don't understand the question.

Q. How does that affect his decisions to buy new equipment or to keep the equipment he's got?

A. A current user of Kodak product, the question, as I understand it, how does he consider the price of a Kodak service agreement when he considers replacing the product?

Q. Yes. Or whether he should replace the product.

A. Well. of course, sure. The price of service is going to be important to him as he makes a decision for what his next product is going to be.

Q. Has it been your experience that increases in the cost of Kodak's EMA for any of its equipment has resulted in people changing in an abnormally large number from Kodak machines or trading in equipment?

A. Your question is has there been a mass exodus away from Kodak products because of increases in service?

Q. Yes, or even a perceptible one that you have experienced at BSMD or BIS.

[p. 84] A. Not that I'm aware of.

Q. Do you have any order of magnitude on the increase in the cost of an EMA for a particular machine over the past five or ten years? For example, on a Starview, what is a standard EMA in 1980, '85, '88?

A. I don't have firsthand knowledge of that.

Q. Do you have a rough order of magnitude on how much that has increased over the years?

A. On a specific piece of equipment, the answer is no.

Q. Generally on all of the equipment?

A. Well, we watch the price of our service agreements very carefully. We don't abruptly normally raise prices on it unless for some reason there has been some shift in cost in servicing that product. But we obviously again, like all our products, are very careful about price

increases and making sure we don't dramatically increase price.

Q. Have there been price increases for service of any products that you are aware of in BISD, BSMD?

* * *

[p. 109] Q. Whether you see those reports or not, do you know if it occurs? Is it a part of your overall profitability?

A. Is profitability on parts part of our overall profitability?

Q. Yes.

A. Again, I hesitate to answer because I'm getting into an area that I'm really not involved in.

Q. You don't know, is what you are saying?

A. I don't know. I don't know the systems there.

(There was a pause in the proceeding.)

Q. Does BISD track how frequent other brands of micrographic equipment are traded into Kodak for people switching to Kodak?

A. Track, keep records?

Q. Yes.

A. No, not that I'm aware of.

Q. Does Kodak track, in the sense of the quality and amounts, the trade-in policies of other manufacturers for Kodak equipment?

A. Again, track it on an ongoing basis to keep records of what they trade?

[p. 110] Q. Yes.

A. Not that I'm aware of.

Q. Do they track it from a competitive intelligence standpoint so that they know what other people are offering for Kodak machines on trade-in?

A. I don't have specific information. Our Business Research people could be doing that, but I'm not aware of it.

Q. Do you know whether other competitors of yours in the Micrographics area have attractive trade-in policies for Kodak equipment?

A. Do I personally?

Q. Yes.

A. No. I don't know what their personal policies are. Again, as I indicated before, we obviously have an ongoing monitoring of knowing what's taking place in the marketplace. But I personally don't have knowledge of that.

Q. So you don't know whether those are attractive or not, or how many of them are being taken advantage of by Kodak machine owners?

A. I don't.

Q. Are you aware of what other machine [p. 111] manufacturers or competitors do when they take a Kodak machine as a trade-in with that machine?

A. I have no knowledge of that.

Q. Does Kodak track beyond the top 15 customers that we saw a chart on earlier what percentage of their sales are to say their top 100 or 200 or 300 customers?

A. You mean with BIS, do you mean?

Q. Yes.

A. No. we may look at it on a – you know, on a specific basis if we have reason at one point in time. But when you say "track," I assume you mean an ongoing reporting system. The answer is no.

Q. Is there more emphasis on larger customers or smaller customers in the Micrographics area? What I'm trying to say, is the sales emphasis, marketing emphasis that you are aware of toward the larger customers in Micrographics or toward the smaller, more diversified product or customer base?

A. We try to emphasis all aspects of our product line. There's no point in having them in the product line. So there's a broad – we have. . . .

* * *

[p. 118] Kodak supplies or service?

A. Either in sales brochures do we make – I am not specifically aware of the wording in the brochures.

Q. Would you take a look at Exhibit 1 to the Gross Declaration, which is a memorandum of April 12, 1985. It's document number 1284 through 1286.

MR. PICKETT: You don't have it there. This is a different Declaration.

THE WITNESS: Are you going to get it?

MR. PICKETT: Somewhere I do.

MR. HENNEFER: Sorry, I have it in my stuff coming.

MR. ROMEYN: Off the record.

(There was a discussion off the record.)

MR. HENNEFER: Would you review that, please?

(There was a pause in the proceeding.)

Q. You were a co-author of this document; is that correct?

A. That's correct.

Q. Where did the impetus, if you will, for this document come from?

[p. 119] A. The impetus.

Q. For the writing of this document.

A. The impetus for writing the document flowed out of comments that we have made earlier in Declarations and elsewhere that we were concerned about our return on assets and the rather sizable parts inventory that we had. And we wanted to implement measures to reduce the size of that parts inventory and therefore get a better return on our assets.

Also, we didn't see why we should be in business to inventory parts for competitors of ours. And that's exactly what we were doing. The policy was originally – the previous policy had been directed, if you will, all towards direct users, which it was originally put in for. And then again with the change in circumstances, we had to re-evaluate that policy.

Q. When you say the previous policy was directed at direct users, what do you mean by that?

A. Well, earlier in our history, this – we had direct customers and the parts were going to our ESRs to support our direct customers. And [p. 120] that's what the whole system was put in for.

Then as the market changed, we had to re-evaluate our policies and programs.

Q. When you say as the market changed, what do you mean by that?

A. Others began to service Kodak equipment, it became obvious that we were inventorying parts for them as well. And there's no reason as business people we should inventory parts for others. We have those parts for our own direct customers.

Q. So this was a decision out of BISD; is that right, a marketing decision to increase the return on assets and to implement a parts policy that was not to inventory parts for others?

A. It was a Kodak policy to improve our return on assets which was implemented in all divisions. Each division looked at their own way to implement that policy, and this is a joint CES/BIS policy that we implemented.

Q. Why was it a joint CESD policy to improve return on assets? Were they required under the new Kodak policy of 1985 –

MR. PICKETT: Go ahead. He's asking two

* * *

[p. 124] to determine that certain types of used equipment might be exempt? For example, equipment that was being serviced prior to its being sold as used equipment to a new owner under an EMA?

A. I can't tell you in the deliberations on how it might be done what all the considerations were.

Q. Was there any consideration in developing the used equipment service policy, which I'm referring to as the policy addressed in paragraph 1 –

A. Number 1, yes.

Q. – as to what effect used equipment was having on new equipment sales?

A. I think they are two separate issues.

Q. When you say they are two separate issues, what do you mean by that?

A. Well, used equipment in the marketplace, if that's sold, obviously has an effect on new equipment sales and that's something you are concerned about.

This was driven by our getting committed to service on what might be equipment that hadn't been well maintained and had an exorbitant cost [p. 125] for that product, and we would lose money on it. So again, having to get involved in making a commitment to service on something we didn't know anything about.

Q. Why wasn't this dealt with on a per call basis? To put the equipment on a per call basis, wouldn't that have accounted for any unexpected cost?

MR. PICKETT: You mean don't offer EMA, simply offer per call?

MR. HENNEFER: Right.

MR. PICKETT: Rather than offer EMA after inspection?

MR. HENNEFER: Right. I'm asking why it wasn't dealt with on that basis?

A. I'm not saying it wasn't. Again, I'm not involved in all the alternatives and details of what may have been considered. But we believe the customers are better off on EMAs.

Q. Paragraph 1 in the April 12, '85 memo is dealing with an inspection; isn't it, and an EMA?

A. Yes.

Q. And you are saying you do not know why you weren't addressing the situation on a per call

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[p. 128] A. Well, again, I think what it says is that starting with the Reliant 1000, we will only make parts available to Kodak people that are servicing products for our customers or to those direct customers themselves that are servicing their own product. And it simply differentiated commercial from government, to make sure that it was clear to our people that we included both those categories.

Q. So what you are saying, in essence, is that government customers generally service their own equipment?

A. No, we are not saying that at all.

MR. PICKETT: Off the record.

(There was a discussion off the record.)

Q. Was there a particular reason why this applied just in the United States?

A. Yes, we're only inventorying parts for the United States and we were concerned with U.S. customers. I don't know how overseas parts were ordered.

Q. In looking at page 2 of the April 12, 1985 memorandum, it says in the first paragraph, "It is not our intention to ship from [p. 129] inventories that are supported by Kodak customers who purchase services from Kodak."

A. Yes.

Q. When you say inventories are supported by Kodak customers, what do you mean by that?

A. Customers that buy EMAs from Kodak give us money in return for services. So what this is saying, they are the ones that pay the bills, they've given us money to support their products, and we are taking that money and inventorying parts for them because they are the ones that are paying the bills.

Q. People on a per call basis pay for parts, don't they?

A. People on per call pay for parts, yes.

Q. Do they pay a price that is different from the prices that are attributed to parts used on an EMA?

A. Does the charge to a customer differ from the internal charge?

Q. Yes.

A. I'm not familiar with those systems.

Q. People, independent third-party service organizations pay for parts as well; is that [p. 130] correct?

A. Everybody who buys parts from us pays for parts, yes.

Q. And the prices for per call parts are the same as the prices paid by independent third-party service organizations; is that correct?

A. As far as I know.

Q. Why was it perceived or stated that these people did not support the inventories of parts?

A. What I mentioned earlier was that the people, the vast majority or the majority of the people who have EMAs pay in advance for those services. And that's the revenue that we get and that's how we are able, with that revenue we are able to inventory parts for those customers. They are our customers.

Q. And you don't consider the revenue coming in from per call or from a third-party service organization as revenue that buys parts?

A. That's revenue but that's not what we are in business for.

Q. When you say that's not what you are in [p. 131] business for, what do you mean?

A. We are in business to support our customers.

Q. Your equipment customers, people who buy equipment from you?

A. Who buy equipment and services from us, yes.

Q. But not people who are buying parts from you?

A. Again, what do you mean?

Q. People who buy parts from you are customers in a sense, in a sense of the word?

A. But they are also competitors.

Q. Yes. And that's the catch. That they are competitors?

MR. PICKETT: I object to the form of the question. What's the question? That's the catch is not a question.

MR. HENNEFER: It's a rhetorical question.

MR. PICKETT: Yes, it is. Go onto the next question.

Q. You said they are not just customers, they are competitors. What do you mean by that?

[p. 132] A. They are competing with us for service for our customers.

Q. And because they are competing with you, you don't regard their income as supporting the inventories, is that what you are saying?

MR. PICKETT: He said that there was income from EMAs that supported the inventory.

MR. HENNEFER: Right.

MR. PICKETT: You switched around the question to say "And so you don't regard the money you get for parts from either ISOs or from per call customers as revenues to you." Now, you are switching back to support. I don't think it's fair to the witness to play with his language that way.

MR. HENNEFER: What was the last question, please?

(The reporter read back the pending question.)

MR. PICKETT: I am going to object to the form of the question, because your premise for it is that the ISOs are isolated from other people who are buying parts. He said the EMAs support the inventories. Others, including ISOs and [p. 133] people who buy on per call basis, don't support the inventories.

MR. HENNEFER: He has also said with regard to ISOs they are customers but they are also competitors.

MR. PICKETT: Sure.

MR. ROMEYN: So are 3M, Bell & Howell and the other people and we don't sell parts to them either, Mr. Hennefer.

MR. HENNEFER: Mr. Romeyn, I would like to have the witness and not the witness' two counsel testify, please.

May I try my question one more time?

Q. Mr. Lacy, you stated with regard to independent service organizations that they were customers but they were also competitors. What did you mean by that?

MR. PICKETT: Asked and answered.

MR. HENNEFER: Okay, I'm going to ask him to answer it again. I think it's been interrupted so many times that I must have missed the answer.

MR. PICKETT: He said they are people who compete for services from our customers.

[p. 134] Q. And why did you differentiate between –

MR. HENNEFER: May I ask the witness to answer this question and not either one of his counsel.

MR. PICKETT: Depends if there's an objection to it. Don't answer unless I indicate there's no objection.

MR. HENNEFER: Your counsel can object but he can't answer the questions for you, Mr. Lacy.

MR. PICKETT: I can also instruct him not to answer, I can do a lot of things. So let's go ahead.

Q. Mr. Lacy, you made a distinction between customers, customers that are also competitors. Why did you differentiate those?

MR. PICKETT: Excuse me, he did not make that distinction. He said that ISOs were customers but they were also competitors. You are talking about a different distinction.

Q. Why did you make the distinction that they were customers but also competitors?

A. I guess I thought I answered that. But [p. 135] let me try again.

You say they give us revenue for the parts; that's true. But I said that they were competitors because they are competing against us for servicing users of Kodak equipment.

Q. Would you differentiate between the revenues received from people who purchased equipment from you and those who purchase parts from you that are also your competitors in servicing the equipment?

MR. PICKETT: I don't understand the question.

THE WITNESS: I don't understand it either.

MR. HENNEFER: Do you want to read the question back?

THE WITNESS: I heard what you said, but I don't understand what it is you are looking for.

(The reporter read back the pending question.)

MR. HENNEFER: I'll ask the question again.

Q. Would you make a differentiation between [p. 136] customers who are supplying you revenues by the purchase of parts on a per call basis and ISOs who are purchasing parts for servicing machines in competition with you?

MR. PICKETT: Could you read that back for me?

(The reporter read back the pending question.)

MR. PICKETT: Do you mean "would you" or "did you"? Would he now, as he sits here today?

THE WITNESS: It there a big difference between those two?

MR. PICKETT: Yes, I think there is. "Did you," did you historically in the past make that differentiation. "Would you" to me means as you are sitting here today would you make that differentiation for me.

MR. HENNEFER: That's what the question is.

MR. PICKETT: Would you make that differentiation for me?

MR. HENNEFER: Yes.

MR. PICKETT: For what purpose?

Q. Do you make that differentiation as you [p. 137] sit here today, which is what the question was.

MR. PICKETT: For any purpose?

MR. HENNEFER: Yes.

MR. PICKETT: Does he differentiate those two categories?

MR. HENNEFER: Yes.

A. Yes, there is a differentiation between those two and that's why we spelled out the policy that way we do.

Q. What is the differentiation between the two that caused you to spell out the policy the way you did?

A. Okay. A direct user of Kodak products who services it himself, has bought equipment from us, is perhaps buying supplies from us and is a customer of ours. A customer who has elected for one reason or another to

do their own service, they are giving us value, they are our customer and we are selling them on an ongoing basis products and services.

Someone who is buying them to service that customer is in a totally different category. They are not an ongoing customer of ours. They don't buy equipment from us.

* * *

[Exhibit L of Declaratioin of James A. Hennefer lodged separately with the Clerk.]

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs,	)	No. C 87 1686 WWS
v.	)	
EASTMAN KODAK COMPANY, Defendant.	)	

KODAK'S REPLY MEMORANDUM

Date: February 26, 1988
Time: 11:00 a.m.
Place: Judge Schwarzer's Courtroom

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F.M. Fisher *et al.*, *Folded, Spindled, and Mutiliated: Economic Analysis and U.S. v. IBM* (MIT Press 1983) 13

I. INTRODUCTION

As an example of an attempt to avoid summary judgment by creating dozens of immaterial factual disputes,

plaintiffs' response to Kodak's motion is a *tour de force*. The litany of anecdotal complaints about "vicious" and "ruthless" Kodak conduct, often based on patently inadmissible evidence,[1] is practically endless. A point-by-point rebuttal of these allegations would take forever.

But there is no need for that. What is needed in this case — and what is missing entirely from plaintiffs' response — is a straightforward application of substantive antitrust law principles to the undisputed facts. Plaintiffs have largely conceded the material factual issues, making it clearer than ever that summary judgment is appropriate.

Although plaintiffs attempt to obscure it, this case presents only two questions. The first, and most important, is whether the antitrust laws require Kodak to sell replacement parts to independent service organizations ("ISOs") so that they can compete against Kodak. The second is whether the antitrust laws require Kodak to guaranteee the availability of service on equipment sold by used equipment dealers.[2]

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[1] The admissibility issues presented by plaintiffs' response — for example, citing to declarations which the witnesses refused to sign — are addressed in a motion to strike filed herewith.

[2] The role of Kodak's used equipment policy in this case appears to have changed from what was alleged in the complaint. Plaintiffs no longer argue that the policy independently violates the antitrust laws. They contend instead that it enhances the effect of Kodak's parts policy. *See, e.g., Pltfs. Mem.* at 17. The change in emphasis is immaterial since under no circumstances does Kodak have a duty to guarantee service on equipment which it does not sell. *See, Kodak Mem.* at 42-43.

The antitrust laws impose no such duties on Kodak. To the contrary, at least since *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), the antitrust laws have respected the right of a manufacturer "freely to exercise his own independent discretion as to parties with whom he will deal." In *Bushie v. Stenocord Corp.*, *Calculators Hawaii, Inc. v. Brandt, Inc.*, and *Dimidowich v. Bell & Howell*, the Ninth Circuit reaffirmed that principle on facts nearly identical to this case. (*See*, Kodak's opening brief ("*Kodak Mem.*") at 22-28.) Those and many other cases establish that a manufacturer, acting unilaterally, must deal with its rivals (or its rivals' customers) only in rare circumstances, and only when the manufacturer has or might obtain market power over the product it sells. Therefore, the dispositive issue in this case is whether Kodak has market power in the markets for the sale of copiers and micrographics equipment. If it does not, nothing else in this case matters.[3]

II. ARGUMENT

A. The Existence or Non-Existence of a Kodak Service Market is Immaterial.

The centerpiece of plaintiffs' attack on Kodak's parts policy is a nearly twenty page argument that there are

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[3] Of course, proof of market power alone does not make out an antitrust case. To avoid summary judgment, plaintiffs must also offer proof of anticompetitive acts by Kodak and they cannot do that. Even if Kodak had market power, it would not have a duty to assist plaintiffs by supplying them with parts. *See, e.g., Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1574 (1987). The Court need not resolve that issue, however, because it is so obviously indisputable that Kodak lacks market power.

discrete markets for servicing Kodak brand copiers and micrographic equipment -- the markets Kodak is allegedly monopolizing. *See Pltfs. Mem.* at 4-6, 27-39. That discussion is completely unnecessary.

Contrary to plaintiffs' assertion, Kodak does not base this motion on the ground that a Kodak service market does not or cannot exist as a matter of fact or law. Our motion has a different basis, and as we said repeatedly in our opening papers (at pp. 8, 27 n.4 & 31) summary judgment is appropriate whether or not there are Kodak service markets.

That is because no matter how it is styled, this is a leveraging case. Plaintiffs' refusal to deal theory and their tying theory are both leveraging theories. The crux of those theories is that Kodak has market power in upstream markets, the equipment markets, that it is using to monopolize downstream markets, (what plaintiffs call "associated aftermarkets"). *i.e.*, the alleged Kodak service markets. If Kodak does not have market power in the upstream markets, it does not matter what other markets it is trying to monopolize. Its attempt will inevitably fail and consumers will not be harmed. In such a case, the existence and contours of the downstream markets are irrelevant.

The law recognizes this. Sixteen years ago, the Ninth Circuit in *Bushie v. Stenocord* rejected the notion that a manufacturer which faces interbrand equipment competition could be found to monopolize a market for the service of its own equipment. The Fifth Circuit did the same thing in *Spectrofuge Corp. v. Beckman Industries, Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939

(1979). The Fourth Circuit has just done so in *Nobel Scientific Industries, Inc. v. Beckman Industries, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 67,809 (4th Cir. Oct. 27, 1987), *aff'g and adopting*, 670 F. Supp. 1313 (D. Md. 1986). Moreover, in *Calculators Hawaii* and *Dimidowich*, the Ninth Circuit rejected monopolization challenges to parts policies nearly identical to Kodak's.

These courts realized that restricting the sale of parts or supplies to service providers cannot harm consumers if the manufacturer faces interbrand equipment competition. This is stated most clearly in the recent *Nobel Scientific Industries* case. There, defendant Beckman was charged with monopolizing an alleged market for Beckman brand reagents, chemicals used in Beckman brand blood analyzers to detect particular substances in the blood. The court granted summary judgment for the defendant because it was indisputable that Beckman blood analyzers faced competition from other manufacturers. Hence. "if the overall cost of operating an analyzer, whether due to reagent cost, service costs or otherwise, is too high, then a hospital or lab will switch to purchase of another company's equipment." 670 F. Supp at 1321. This prevented any possible anticompetitive effect in any reagent market.[4]

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[4] The *Nobel* court concluded that the reagent market could not be limited to Beckman reagents, and that Beckman lacked market power in the broader reagent market. While the latter was undoubtedly true, it was unnecessary for the court to identify the parameters of reagent competition. Analyzer competition prevented Beckman from exerting market power in any reagent market, however defined.

Plaintiffs' complaint acknowledged that this is the correct analysis by alleging that Kodak has a "brand monopoly," *i.e.*, that its products do not compete with similar products sold by Xerox, IBM, 3M, etc. However, now that they have had full discovery on that issue, plaintiffs no longer pursue their argument. Consequently, *all* of the record evidence establishes that Kodak does face intensely competitive equipment markets. *See Kodak Mem.* at 4-7. All of the record evidence establishes that buyers of copiers and micrographic equipment consider service costs when purchasing equipment. (Murray Decl. at 13, 15; Lacy Decl. at 14) And all of the record evidence establishes that Kodak recognizes this by pricing its service contracts to be competitive with its equipment competitors. (Murray Decl. at 15; Lacy Decl. at 16)[5] Under all of the authorities cited above, that is the end of this case.

B. Plaintiffs' "Lock-In" Theory is Without Merit.

The only theory plaintiffs advance to explain how Kodak might obtain monopoly profits is the so-called

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[5] At one point, plaintiffs suggest that Kodak's service prices must be supracompetitive because ISOs are able to service Kodak equipment for less than Kodak charges and still make a profit. *E.g., Pltfs. Mem.* at 6. There are numerous reasons why that facile analysis does not prove supracompetitive pricing. One is that ISOs are free-riders. Free-riders can always undercut the prices of their competitors because they do not bear the costs associated with demand-enhancing functions such as training, promotion, and higher quality service. That is what makes them free-riders.

"lock-in" theory. Plaintiffs claim that *existing* Kodak customers (not new prospects) are subject to supra-competitive service pricing because they cannot feasibly switch to competitive equipment. The theory is legally, conceptually and factually groundless.

The only potential legal support for such a theory is the Ninth Circuit's controversial decision in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3534 (1985).[6] *Digidyne* was a tying case which held that the inability of existing Data General customers to switch to competitive equipment could, together with several other factors, support a jury's determination that Data General had tying market power. It does not help these plaintiffs.

First, *Digidyne* itself establishes that the lock-in theory applies only to tying cases and not to monopolization cases. A major issue in *Digidyne* was whether plaintiff had to show that Data General had market power throughout the tying product market (the market in which Data General's "RDOS" system was sold) or

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[6] *Digidyne's* analysis has been expressly rejected by both the Sixth and Seventh Circuits. *See, A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n. 4 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986). In addition, Justices White and Blackmun — two of the five Justices who favor retention of the per se rule in tying cases — would have granted certiorari in *Digidyne*. *See*, 473 U.S. 908 (White, J., joined by Blackmun, J., dissenting from denial of certiorari). The Ninth Circuit itself criticized and narrowly interpreted *Digidyne* in *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 n. 4 (9th Cir. 1987). It is not a case to be read expansively.

merely over some buyers in that market. The court ruled that in a *per se* tying case the latter sufficed, and distinguished this from monopolization cases, in which a showing of power "in the whole of the relevant market" is required. 734 F.2d at 1339 & 1340-41, *citing, E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). Obviously, one cannot prove market power throughout an entire market by arguing a lock-in, since by definition a lock-in only affects those consumers who already own the defendant's product. Neither *Digidyne* nor any other case suggests that a lock-in can establish the monopoly power required in a Section 2 case.

Second, *Digidyne* does not support plaintiffs' argument that a lock-in can by itself support a showing of market power. In fact, it strongly implies the contrary. Data General argued that lock-in was irrelevant in determining its market power because buyers were aware of the potential lock-in when initially selecting Data General's product and could choose not to lock themselves in. *Id.* at 1342. The Ninth Circuit did not quarrel with the logic of this argument, which would render a lock-in meaningless in a case where the defendant did not have point-of-sale leverage. Rather, it found that factors other than the lock-in gave Data General that initial leverage. *Id.* at 1343 (citing the copyright protection of Data General's product, its "special attraction," trade secret barriers, and other barriers to the development of comparable products). Here, plaintiffs concede the fact of interbrand competition at the initial point of sale, and they do not rebut Kodak's evidence that copier and micrographics equipment customers consider long term service costs when choosing between Kodak and its

equipment competitors. Nothing in *Digidyne* suggests that a lock-in can prove market power under those circumstances.

Third, plaintiffs here have nowhere near the type of lock-in evidence that Digidyne had. Data General's RDOS system (the tying product) was sold primarily to original equipment manufacturers who combined it with application software and hardware to create a complete computer system for resale. The OEMs developed application software at substantial expense, often millions of dollars. and specifically tailored it to be compatible with RDOS, and only RDOS. The time required and the expense (90% of the original development costs) rendered it impossible for an OEM to abandon the RDOS system, around which they had built their businesses. Indeed, the lock-in was so effective that no existing Data General OEM customer had ever switched to competitive equipment. *Id.* at 1342 & n.4.

Plaintiffs' case is nothing like that. Consider copiers first. The *only* evidence that plaintiffs offer suggesting that Kodak copier customers are locked-in is that the resale value of used equipment is low relative to its original sales price. That is not a factor mentioned in *Digidyne*, and it is a wholly insufficient basis upon which to find a lock-in. The fact is that almost every product has a lower "used" price than its "new" price; it is practically American folklore that an automobile loses value the minute it leaves the showroom.[7] But that does not and

[7] Of course, because this phenomenon is so well known, consumers can be expected not to buy durable goods unless they are satisfied that they are not committing to a poor or costly product. This is the point that the Ninth Circuit noted. and seemed to concede, in *Digidyne*, 734 F.2d at 1342.

cannot mean that every manufacturer of a product that loses value has market power. If it does mean that, the lock-in exception will swallow the rule that point-of-sale competition negates a finding of market power.

Moreover, as plaintiffs make the argument, it proves too much. Plaintiffs claim that a copier selling for $75,000 new has a $2,500 resale value after two to three years, or just twenty percent of its 14 year useful life. *Pltfs. Mem.* at 15. If that were true — if one could really purchase eighty percent of the value of a copier for less than four percent of its original price — no consumer would ever buy a new copier. (Plaintiffs concede that used copiers compete with new copiers.) Kodak would be forced to lower its equipment prices drastically, and would thereby essentially give back (albeit in advance) any monopoly profits that it might be able to earn from parts and service sales. The consumer would be none the worse for it.[8]

[8] Of course, in the real world none of this happens. Plaintiffs' argument is built upon the assumption that because Kodak will service a copier for up to 14 years, that is the useful life of a copier. That is nonsense. Kodak entered the copier market only thirteen years ago (Murray Decl. ¶ 1); surely plaintiffs would not claim that every copier Kodak ever made is still within its useful life. In fact, plaintiffs' argument is a contrivance. The Court may recall that at the initial status conference in this case plaintiffs' counsel claimed that technological change, *i.e.*, obsolesence, meant that the useful life of Kodak equipment was "four or five years," as a result of which plaintiffs were unable to make their own parts since they could not keep current with the latest equipment. The Court responded that counsel had argued himself out of court because a short useful life negated the effects of any lock-in.

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With respect to micrographics equipment (but not copiers), plaintiffs also argue the theory of lock-in through compatibility requirements that was pressed in *Digidyne*. They allege that Kodak equipment uses record indexing systems which cannot be used with competitive retrieval equipment, thereby stranding a customer's existing records if he switches from Kodak to another vendor. Plaintiffs' argument is so wrong as to be deceptive.

Plaintiffs fail to inform the Court that virtually all micrographic equipment sold today uses a "blip" indexing system conforming to a standard published in 1979 by the American National Standards Institute ("ANSI") and the National Micrographics Association ("NMA"). *See Document Mark (Blip) Used in Image Mark Retrieval Systems*, ANSI/NMA MS8-1979 (approved 9/13/79), attached as Ex. 1 to Declaration of Theodore R. Spies, dated February 10, 1988, filed herewith. The purpose and effect of this standard, which Kodak strongly supported, was to facilitate interfaces between equipment from different vendors. The coding mark adopted, the blip, has been utilized by all equipment makers for many years, allowing consumers to mix and match equipment from different vendors as they please. Over *ninety-nine percent* of all of the automated retrieval equipment sold today is

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Now plaintiffs have completely reversed themselves and tripled the useful life of the equipment. As it is based on an apples-to-oranges comparison equating service availability to useful life, and as it leads to absurd results, plaintiffs' evidence is entitled to no weight.

blip equipment, and over *ninety-five percent* of the automated retrieval devices presently in use utilize blips. (Spies Decl. ¶ 5) There is no possibility that plaintiffs are ignorant of the predominance of blip coding, yet they make no mention of it in their papers.

Instead, plaintiffs claim that Kodak's customers are locked-in because of the uniqueness of Kodak's "Miracode" and "Oracle" indexing systems. This is disingenuous. The fact is that Kodak stopped offering the Miracode system over ten years ago, in 1978. (Spies Decl. ¶ 8) Today, there are *less than fifteen* Miracode systems operating in the entire world. (*Id.*) Moreover, contrary to plaintiffs' argument, even this tiny group of customers may access their Miracoded records with blip retrieval devices if they wish. (*Id.*)

The facts about the Oracle system are similar. Kodak presently offers Oracle indexing and that system is unique. But plaintiffs fail to mention two key facts. First, Kodak's Oracle sales are only a small fraction of its total sales. In 1987 less than five percent of Kodak's total sales of automated retrieval equipment were Oracle sales. (Spies Decl. ¶ 9) Kodak estimates that less than 15% of its existing customers use Oracle — a marked contrast from *Digidyne* where 93% of Data General's RDOS customers were supposedly locked-in. Second, the fact is that one *can* access Oracle coded film on non-Kodak retrieval devices. Devices to facilitate just that are available on the market at a reasonable cost. (Spies Decl. ¶ 10) Thus, not even the small minority of existing Kodak customers who use Oracle are locked-in to Kodak due to any compatibility difficulties.

The ultimate proof that Kodak customers are not locked-in is the fact that Kodak regularly loses existing customers to its equipment competitors. Canon and Minolta in particular have built their micrographics market share largely at Kodak's expense, something which simply could not happen if plaintiffs' theory were true. (Spies Decl. ¶ 11) Moreover, as is true in the copier industry, it is commonplace for micrographics customers to use multiple vendors to satisfy their needs (*id.*), again something which is totally inconsistent with plaintiffs' theory of the case. The only possible conclusion on this undisputed evidence is that there is no economically significant lock-in in the micrographics industry.

Finally, even if the Court were to assume that some existing Kodak customers are locked-in, it would still be impossible to conclude that Kodak has market power. Whenever only a portion of a firm's customers are subject to a lock-in, competition for new or non-locked-in customers prevents the firm from extracting monopoly prices from its existing customers. That is because competition for new customers (or those otherwise free of any lock-in) sets the market price. Under those circumstances, the only way an incumbent firm can extract monopoly prices is through price discrimination; *i.e.*, it must be able "to charge a higher price to existing customers than to new ones." F.M. Fisher *et al.*, *Folded, Spindled, and Mutilated: Economic Analysis and U.S. v. IBM* (MIT Press 1983) at 202 (excerpts found in Authorities Appendix).[9] Plaintiffs

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[9] The same is true where, as here, customers stagger their purchases over time so that they are frequently buying some

(Continued on following page)

do not even contend, let alone offer evidence, that Kodak engages in such price discrimination, and they concede that there is vigorous competition for new customers. The only possible conclusion is that interbrand equipment competition prevents Kodak from having or exerting any market power, even over its existing customers.

C. There is No Evidence of Any Concerted or "Hybrid" Refusal to Deal

Plaintiffs' conspiracy case appears to be totally makeweight. Despite the grandiose allegations of the complaint, plaintiffs produced *no* evidence of the *Dimidowich*-type "hybrid" conspiracy they alleged. Their brief claims that Kodak has agreements with unnamed service bureaus-moonlighting-as-ISOs not to sell other ISOs replacement parts, *Pltfs. Mem.* at 9, but there is not a word of this in the declarations. This utter failure of proof mandates summary judgment.

Plaintiffs' declarants do state that they have been unable to get parts directly from Kodak's parts suppliers, and they claim to have been told by some suppliers that

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(Continued from previous page)

new equipment. A firm wishing to charge supracompetitive service prices must be willing to lose the replacement equipment sales — and, of course, the future parts and service revenues that would follow from those sales. The undisputed evidence in this case is that replacement or upgrade business is a major oppportunity for copier and micrographics equipment makers, and that Kodak would not jeopardize its ability to make those sales by charging supracompetitive prices for service. (*See* Lacy Decl. ¶ 18; Murray Decl. ¶ 16)

their refusal to sell parts is pursuant to agreements with Kodak. The obvious hearsay problems with this evidence are addressed by separate motion. However, even if the Court considers the evidence, it does plaintiffs no good. An agreement between an input supplier and a manufacturer is a paradigm vertical arrangement, and as such is subject to the rule of reason.[10] *Bushie*, 460 F.2d at 120, *Calculators Hawaii*, 724 F.2d at 1337, and *Dimidowich*, 803 F.2d at 1481 n. 4, all establish that a manufacturer's refusal to sell replacement parts, even pursuant to a vertical conspiracy, is lawful.[11]

D. There Has Been No Tying.

This Court has previously noted how tying cases often become "a semantic shell game" in which litigants spend more time "fractionating the [relevant product] into separate components" rather than dealing with economic realities. *Casey v. Diet Center, Inc.*, 590 F. Supp. 1561, 1565 n.4 & 1566 (N.D. Cal. 1984). That is certainly true here. Plaintiffs have rearranged the shells again and

[10] Plaintiffs also claim that Kodak secured agreements from some of its customers (again unnamed) that they would not resell parts to ISOs. That would also be a purely vertical conspiracy.

[11] It is noteworthy that plaintiffs concede that the parts suppliers' refusals to sell them parts were based on the parts being proprietary to Kodak. *See, e.g.*, Hernandez Decl. Ex. D. Surely the antitrust laws do not force Kodak to allow its parts suppliers to release proprietary goods and technology to Kodak's competitors.

now allege two tie-ins where parts are the tying product.[12] First, they claim that Kodak uses its control over parts to force consumers to buy Kodak equipment, and second, they allege that Kodak uses its control over parts to force consumers to buy Kodak service.

It is absurd to analyze this case as if parts are the tying product. The very notion that a consumer could be forced to buy a $75,000 copier so that they could get a $10 replacement part is preposterous. Yet, if one assumes that parts are the tying product, the relevant inquiry is whether that is possible.

Obviously, that is letting the tail wag the dog. Kodak does not sell parts because there is a demand for parts distinct from the demand for its equipment. It sells parts because its equipment is made of those parts, and occasionally it is necessary to replace something. Similarly, there is no demand for parts distinct from the demand for service. Parts have no utility or economic value unless they are used to service the equipment that is made up of those parts. Parts are not a separate product to which either equipment or service can be tied.[13] *See, Casey*, 590 F. Supp. at 1566.

[12] Plaintiffs originally alleged that Kodak tied parts and service to equipment (Complaint ¶¶ 57-58), but they have now abandoned those theories.

[13] Plaintiffs actually concede the point since their sole argument on the separate products issue (*Pltfs. Mem.* at 42-43) is that equipment and service are separate products. That has nothing to do with whether parts and equipment are separate products or whether parts and service are separate products.

In any event, equipment and service are not tied to the sale of parts. While it is true that one's eligibility to buy parts is dependent on prior purchases of the associated equipment, no Kodak customer has ever been forced to buy equipment or service so that they could buy a part. If a customer is eligible to buy parts, he may do so without any additional obligation to buy Kodak equipment or service. There is no tie.

E. Plaintiffs' Unfair Conduct Allegations Do Not Impeach Kodak's Business Justifications or Prove Anticompetitive Intent.

Kodak's declarations establish that its parts policy was adopted to foster the legitimate business purposes of maintaining direct responsibility for service, reducing inventories, and not supporting free-riding. They also establish that the used equipment policy is designed to protect Kodak from the adverse financial consequences of placing equipment of unknown condition under a fixed-price maintenance agreement. These business justifications entitle Kodak to summary judgment even if it has market power or has engaged in tying. *See Kodak Mem.* at 28-31; *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1348 (9th Cir. 1987) (defendant "may demonstrate a business justification for an otherwise per se illegal tying arrangement").

Plaintiffs' response to these business justifications is a rhetorically charged argument that Kodak is really trying to put ISOs and used equipment brokers out of business, that it has disparaged them, and that Kodak officials

have expressed animosity toward them.[14] The short answer to these charges is, "So what?" The antitrust laws do not forbid animosity between competitors and they certainly do not forbid competitors from employing legitimate means to put each other out of business. As Judge Peckham noted in *General Communications Engineering, Inc. v. Motorola Communications and Electronics, Inc.*, 421 F. Supp. 274, 286 (N.D. Cal. 1976), "the very nature of unfettered competition is exclusionary." More recently, Judge Posner made the same point in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1574 (1987). There, the plaintiff claimed that Western Union, which was assumed to have monopoly power, had improperly denied plaintiff access to an important vendor list after having allowed access initially. The plaintiff made much of Western Union's subjective intent, as evidenced by a document stating that Western Union wanted to "flush these turkeys."

> That Western Union wanted to "flush these turkeys" tells us nothing about the lawfulness of its conduct. Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and

[14] Plaintiffs also claim that Kodak's micrographics parts policy is discriminatory in practice because some ISOs, often employing subterfuge, manage to circumvent it. This is nothing new. Kodak admitted in its opening papers (see Lorenson Decl. ¶¶ 13-17) that its enforcement mechanisms are incapable of policing the policy with 100 percent effectiveness. But Kodak's failings *benefit plaintiffs*. Using their dog's name or some other ploy, they get the parts they want. Surely that does not make Kodak's policy worse (from plaintiffs' perspective) than if Kodak were to police it more effectively.

> getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run. Consumers would be worse off if a firm with monopoly power had a duty to extend positive assistance to new entrants, or having extended it voluntarily a duty to continue it indefinitely. * * * The question therefore is not whether Western Union withdrew the vendor list in order to make money at the expense of Olympia, which of course it did, but whether such withdrawl was an objectively anticompetitive act. It was not
> . . . .

Id. at 379-80. The same comment applies here.[15]

As to plaintiffs' allegations of disparagement and other "unfair" conduct, they are simply not the stuff of which an antitrust case is made. Judge Peckham's decision in *General Communications Engineering* squarely holds that disparagement and unfair conduct do not constitute antitrust violations. 421 F. Supp at 289-90. If plaintiffs feel they have been disparaged or treated unfairly, they can pursue their claim, and Kodak will respond to it, in state court.

F. Additional Discovery is Unnecessary

At the conclusion of the December 21 telephone status conference, the Court ordered plaintiffs to state in

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[15] *Western Union* also answers plaintiffs' claim that they relied on the so-called "Replacement Parts Principles" or other representations by Kodak personnel that they could buy parts. *See, e.g., Pltfs. Mem.* at 22. If they did, they have at best a contract or tort claim, but not an antitrust case.

their summary judgment papers what specific additional discovery they want before the Court rules on this motion. *Order*, 1/4/88 ¶ 4. Counsel was directed to follow the requirements of Rule 56(f) as stated in the relevant case law. Those cases establish that it is plaintiffs' burden to state specifically what evidence they seek, and "to put forth sufficient facts to show that the evidence sought exists." *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987).

Plaintiffs have not met that standard. Their counsel's declaration, which is the whole of their Rule 56(f) case, states little more than the hope that plaintiffs could get more evidence and could cure the evidentiary problems with their existing case if only they had more time. Indeed, in a paragraph that simply flaunts the Rule, counsel incorporates the Table of Contents to his brief in order to "specify" the issues on which additional discovery is needed. (Hennefer Decl. ¶ 21) That cannot possibly be sufficient.

It doesn't matter anyway. The fact is that on the one issue that really matters — market power in the interbrand equipment markets — plaintiffs do not even seek additional discovery. They practically had to be forced to take the discovery which they have had on that issue, and then they did not cite to any of it in their brief. Rather, plaintiffs have chosen to stand or fall on a theory of the case that ignores market power in the interbrand equipment markets. That was their choice to make, and they made it. But no amount of discovery can change the fact that the theory is contrary to the law. Rule 56(f) does not require additional discovery where, as here, plaintiffs' claim is doomed to fail in any event. *Wallace v. Brownwell*

Pontiac-GMC Co., Inc., 703 F.2d 525, 528 (11th Cir. 1983); *Colan v. Prudential-Bache Securities, Inc.*, 577 F. Supp. 1074, 1084 (N.D. Ill. 1983).

III. CONCLUSION

Notwithstanding plaintiffs' attempt to obscure the matter with a blizzard of irrelevant facts, this case comes down to a question of duty: does Kodak have a duty to render positive assistance to ISOs by selling them parts, or a duty to render positive assistance to equipment brokers by blindly servicing the equipment they sell no matter what its condition. Questions of duty are inherently questions of law. Where, as here, it is undisputed that Kodak has no market power to exploit against anyone, it is indisputable that it has no duty to assist the plaintiffs. Kodak is entitled to summary judgment.

Dated: February 12, 1988.

Respectfully submitted,
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(10)

No. 90-1029

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICRO-GRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, d/b/a G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, d/b/a MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; and CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
VOLUME IV, PAGES 706-937

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al., Plaintiffs,	No. C 87 1686 WWS
v.	DECLARATION OF THEODORE R. SPIES
EASTMAN KODAK COMPANY, Defendant.	

I, Theodore R. Spies, having been duly sworn, declare and state as follows:

1. I am employed by Eastman Kodak Company as Coordinator, Marketing, Retrieval Products, for the Business Imaging Systems Division ("BISD"). In that capacity, I have responsibility for advertising, marketing and technical support for microfilm retrieval products currently sold by Kodak. I have been employed by Kodak since June 1970. I have eighteen years experience in the micrographics industry and am fully familiar with Kodak's micrographics products and the competition they face.

The facts stated in this declaration are of my own personal knowledge and I could competently testify to them if called as a witness.

2. The purpose of my declaration is to respond to the allegations of the plaintiffs in this case that existing Kodak micrographics customers are "locked-in" to Kodak. I understand plaintiffs to claim that Kodak products employ unique indexing systems which make it impossible, or at least economically impractical, for our customers to use non-Kodak retrieval devices to access their records. Those allegations are completely false.

3. Since micrographics systems typically store and manage large volumes of records, it has been commonplace for many years to index microfilm so that particular records may be retrieved automatically. In the mid-1970s, there was an industry-wide consensus that a standardized indexing system was desireable. It was believed that a standardized system would allow consumers to mix and match equipment from different vendors, and would prevent the type of lock-in that plaintiffs say exists today. Kodak shared that view and strongly supported adoption of standards.

4. In the late 1970s, the National Micrographics Association ("NMA") and the American National Standards Institute ("ANSI") worked together to develop appropriate standards. The NMA created a Micrographics Encoding Standards Committee consisting of representatives from several interested groups, including manufacturers such as Kodak, Bell & Howell, IBM and 3M. That committee drafted and approved a standard for the "blip" encoding system, which had by then become the

most popular of several competing encoding systems. The standard specified the location, dimensions and density of the blip mark in great detail. The standard, entitled *Document Mark (Blip) Used in Image Mark Retrieval Systems*, was approved as American Standard on September 13, 1979 and was published by ANSI and the NMA as ANSI/NMA MS8-1979. A copy of the standard is attached as Exhibit 1 to my declaration.

5. Since adoption of the blip standard, blips have become the dominant coding/indexing system used in the micrographics industry. All equipment manufacturers, including Kodak, utilize blip coding today. I would estimate that over ninety-nine percent of all of the automated micrographics retrieval equipment sold in 1987 used the standardized blip system and that at least ninety-five percent of the automated micrographics retrieval equipment presently in use (including equipment sold prior to 1987) uses blips. Over ninety-five percent of the automated micrographics retrieval equipment Kodak sold in 1987 used blips, and I would estimate that at least eighty-five percent of Kodak's installed base of such equipment uses blips.

6. There is no lock-in as to micrographics users who use blip equipment. They may mix competing vendors' equipment as they choose, for example using Kodak cameras to film and encode their records and Canon or Minolta reader-printers to retrieve them. This happens with increasing frequency. In fact, Canon and Minolta are examples of firms that have built their market shares largely by displacing Kodak equipment from customer installations. Of course, standardization has also allowed Kodak to displace our competitors from their customers,

which we could not have done if our equipment was incompatible with theirs.

7. Plaintiffs also suggest that compatibility problems between the computer hardware and software used in the more recent, sophisticated micrographics systems create a lock-in. That is not true either. Again, there is an ANSI standard which refutes this suggestion. Entitled *Microfilm Computer Assisted Retrieval (CAR) Interface Commands,* ANSI/AIIM MS40-1987, it provides command interchange guidelines for all suppliers of computer assisted retrieval ("CAR") systems. Like the blip standard, it allows customers to mix and match components of CAR systems offered by different vendors. A copy of this standard is attached as Exhibit 2.

8. I understand the plaintiffs claim that Kodak customers who use our Miracode and Oracle indexing systems are locked-in. This is another false charge. The Miracode system, which was unique to Kodak, was discontinued in 1977. It has not been sold for eleven years. Today there are less than fifteen Miracode installations in the whole world. All other former Miracode customers have migrated to new equipment, proving that they were not locked-in to that indexing system. In fact, there are techniques to convert Miracode records to a computer index which allows any retrieval equipment with blip counting capability to retrieve Miracode film. The few remaining Miracode users are anomalies who for whatever reason prefer to use an antiquated technology as long as they can.

9. Kodak still sells the Oracle indexing system, which was developed prior to the adoption of the ANSI

blip standard. However, Oracle sales represent only a small fraction of Kodak's overall micrographic sales. In 1987, Kodak's Oracle sales accounted for less than five percent of its total sales of automated retrieval equipment, and I would estimate that of Kodak's total existing customers, less than fifteen percent use Oracle. Oracle customers tend to have less sophisticated, relatively low volume recordkeeping needs. Oracle is rarely used in high volume applications.

10. Even Oracle customers are not locked-in. Oracle codes can be read on any manufacturer's blip retrieval equipment with the aid of translation devices available on the open market. Attached as Exhibit 3 to my declaration is a brochure from Connecticut Micrographics, Inc. describing its MRS 450 Microfilm Retrieval System. This device can be attached to a wide variety of non-Kodak reader printers, and allows them to automatically retrieve Oracle film.

11. It is clear, therefore, that indexing systems do not create compatibility obstacles to existing Kodak customers who want to buy non-Kodak equipment. Moreover, the fact is that mixed equipment environments are commonplace today, proving that no one is locked in to any vendor. In fact, if technology places any role regarding a lock-in, it is to prevent it. Advances in micrographic and other image management technology are a major impetus for customers to abandon their existing equipment, including Kodak equipment, in favor of equipment which, even at a higher initial cost, promises to be more cost-effective in the long run because of productivity gains. Our customers are by and large very knowledgeable and sophisticated about the ongoing and long run

costs of managing images with micrographics and other technologies. They know the advantages and disadvantages of staying with a particular vendor or technology, and they do not hesitate to switch either if it is in their economic self-interest.

I declare under penalty of perjury that the foregoing is true and correct and that I executed this declaration on February 10, 1988 at Rochester, New York.

/s/ Theodore R. Spies
Theodore R. Spies

* * *

[Exhibits 1, 2 and 3 to Declaration of Theodore R. Spies are lodged separately with the Clerk.]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 88-2686

IMAGE TECHNICAL SERVICES, INC., et al.,
Plaintiffs-Appellants,
v.
EASTMAN KODAK COMPANY,
Defendant-Appellee.

APPEAL FROM THE SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLANTS

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CERTIFICATE AS TO INTERESTED PARTIES

No. 88-2686: *Image Technical Services, Inc., et al. v. Eastman Kodak Co.*

The undersigned, counsel of record for appellants, certifies that the following have an interest in the outcome of this case:

Image Technical Service, Inc., a California corporation;

J-E-S-P, Company, Inc., a New Jersey corporation;

Shields Business Machines, Inc., a Pennsylvania corporation;

Micrographic Services, Inc., a Missouri corporation;

Micro Maintenance, Inc., an Illinois corporation;

Atlanta General Microfilm Co., Inc., a Georgia corporation;

Roger Katona d/b/a **G. & S. Electronics**, a California partnership;

Amtech Equipment Maintenance, Inc., a Minnesota corporation;

Advanced Systems Service, Inc., a Colorado corporation;

B.C.S. Technical Services, Inc., a Colorado corporation;

Bob Ingle, Inc., a Missouri corporation;

Data Prox Equipment Co, a New Jersey corporation;

Fisher Micrographics, Inc., a Missouri corporation;

I.O.A. Data Corp., a New York corporation;

Searle Enterprises, Inc., d/b/a **Micro Image**, a Texas corporation;

Midwest Microfilm Equipment & Service, Inc., a Minnesota corporation;

Omni Micrographic Services, Inc., a California corporation;

CPO, Ltd., a California corporation; and

Eastman Kodak Company, a New Jersey corporation.

These representations are made to enable judges of the court to evaluate possible recusal.

Dated: October 10, 1988

/s/ James A Hennefer
JAMES A. HENNEFER
Attorneys for Appellant

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Sherman Act Section 1

1. Do triable issues of fact exist as to whether defendant Kodak's admitted agreements with owners of its equipment not to sell them replacement parts (the tying product) unless they agree not to purchase service (the tied product) from plaintiff *or* that they will purchase service as well as replacement parts form Kodak violate Section 1 of the Sherman Act (15 U.S.C. § 1)?

2. Does this Court's holding in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied* 473 U.S. 908 (1985), *rehearing denied* 473 U.S. 926 (1985), that *per se* tying is shown by: 1) separate "tied" products; 2) sufficient power in the tying product to appreciably restrain competition in the tied product; and 3) effect upon a substantial amount of commerce in the tied product, compel reversal of the district court's summary judgment?

Sherman Act Section 2

3. Do triable issues of fact exist as to whether defendant Kodak's change in its long-standing parts policies and its refusal to sell parts to plaintiffs, over which parts it has a "natural monopoly," violate Section 2 of the Sherman Act (15 U.S.C. § 2), where Kodak's refusal "unnecessarily excludes or handicaps competitors" pursuant to *Aspen Skiing Company v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)?

STATEMENT OF JURISDICTION

A. Statutory Basis of Subject Matter Jurisdiction of the District Court.

The district court had subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1337 and 15 U.S.C. §§ 15 and 25.

B. Finality of Judgment and Statutory Basis of Jurisdiction of this Court.

The district court granted Kodak's motion for summary judgment as to all of plaintiffs' claims pursuant to Fed. R. Civ. P. 56(b) and dismissed all claims in its "Memorandum of Opinion and Order" of April 15, 1988, which was filed on April 18, 1988. (Excerpts, pp. 64-73). The "Judgment" under Fed. R. Civ. P. 54(a) was entered April 19, 1988 (Excerpts, p. 74). This Court has jurisdiction of the appeal of the final decision of the district court pursuant to 28 U.S.C. § 1291.

C. Timeliness of Appeal.

The "Notice of Appeal" was timely filed on May 12, 1988. (Excerpts, p. 75.)

STATEMENT OF THE CASE

A. Nature of Case.

This is an antitrust action by 18 plaintiffs from 10 states throughout the United States who are independent service organizations ("ISOs"). They provide service for Kodak manufactured micrographics (microfilm) and photocopy machines. Plaintiff ISOs compete directly with Kodak for service of Kodak equipment. Their replacement parts used for such service are purchased almost exclusively from Kodak. Kodak has a natural monopoly over such replacement parts. Plaintiff ISOs are "customers" of Kodak for parts and "competitors" of Kodak for service.

Beginning in 1985, Kodak, changed its long-standing contracts, policies and practices of selling replacement parts to these ISOs who serviced Kodak equipment. Kodak has charged, and ISOs have paid and are willing to pay, high prices for replacement parts, prices which make Kodak's sales of parts a profitable business for Kodak.

The number of ISOs and the volume of their business has grown dramatically over the past ten years. Kodak's new contracts, policies and practices, instituted since

1985, are designed *not* to allow the sale of any replacement parts (directly or indirectly) to its ISO service competitors as a means of restricting their business and driving them out of business.

As to Kodak micrographics replacement parts, Kodak has sold and does sell such parts to anyone, without restrictions, *except ISOs*. Since 1985 Kodak has maintained a program to identify "BENU's" (Business Equipment Non Users) – a Kodak acronym directly equated with ISOs. Kodak has also instituted "tiger teams" to ferret out BENU's who try to order parts. Accounts of BENU's are "flagged," and parts ordered by BENU's are then severely restricted (as to older equipment parts), or totally cut off (as to newer and certain other equipment parts).

As to Kodak photocopy replacement parts, Kodak's practice since 1985 (which was different at times from its stated policy) has been to cut off the supply of replacements parts to ISOs altogether.

To prevent ISOs from providing service to Kodak micrographics or photocopy equipment owners, Kodak now will not sell replacement parts to Kodak equipment owners unless: (1) the owners install the parts themselves, and they do not employ an ISO to do so (if they have purchased the equipment directly from Kodak), or (2) the owners also purchase Kodak service (if they have not purchased the equipment directly from Kodak).

The plaintiff ISOs in this action sued Kodak on a number of theories, two of which are at issue in this appeal: **(1)** Kodak has tied its service (the tied product) to its replacement parts (the tying product) over which it has a natural monopoly, in violation of Section 1 of the

Sherman Act (15 U.S.C. § 1); **(2)** Kodak has monopolized the service market by changing its long-standing policies on the sale of parts so that the new policies unnecessarily exclude or handicap Kodak's ISO competitors in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

B. Course of Proceedings and Disposition Below.

The Complaint in this action was filed on April 14, 1987. On August 14, 1987, prior to any discovery by plaintiffs, Kodak filed its notice of motion and motion for summary judgment. Kodak brought its motion for summary judgment on the basis that "Kodak's . . . policies . . . with relatively minor corrections, are as the Complaint describes them." (Record, Docket No. 19, p. 2, ll. 15-17.)

On September 18, 1987, the district court granted plaintiffs permission to take four depositions, propound one set of twenty-five interrogatories and twenty-five requests for production of documents. On January 4, 1988, the district court granted plaintiffs permission to take two additional depositions. (Record, Docket No. 41, p. 2 ll. 22-28, p. 3 ll. 26-28.) The district court refused to entertain a motion for additional discovery or to compel responses to discovery already propounded (Record, Docket No. 41, p. 3, ll. 21-28, p. 4, il. 1-3).

The plaintiffs then filed their responsive papers and declarations. After the filing of Kodak's reply memorandum and declarations, the district court advised counsel by telephone on February 22, 1988 that oral hearing had been taken off calendar, to be reset by the court. (Excerpts, p. 79, Docket Minute Entry No. 48.) There was

no notice or resetting of the oral hearing, and, without oral hearing, on April 15, 1988, the district court issued its Memorandum of Opinion and Order which was filed April 18, 1988. (Excerpts, pp. 64-73.) Judgment against plaintiffs was entered on April 19, 1988. (Excerpts, p. 74.) The district court's order granted defendant Kodak's summary judgment on all federal antitrust claims, and dismissed all pendent state law claims for lack of subject matter jurisdiction. Plaintiffs filed a timely notice of appeal on May 12, 1988. (Excerpts, p. 75.)

STATEMENT OF FACTS.

I. The History of Kodak's Parts Policy And of ISO Service.

A. Kodak's Pre-1985 Policy on Replacement Parts.

Kodak's parts policy until 1985 was stated to its customers in the Kodak CESD ("Customer Equipment Service Division") "Replacement Parts Principles" which stated that:

> Kodak will sell replacement parts to *any party who intends to use them to repair Kodak equipment*. (Excerpts, p. 38, emphasis supplied.)

Kodak's "Terms of Sale" for parts stated:

> Kodak manufactures and stocks parts to meet the repair needs of its equipment owners, dealers, distributors, and service outlets which are repairing finished products distributed by Kodak. (Excerpts, p. 37.)

The practice was the same as the stated policy. Kodak sold parts to *anyone* using them to repair Kodak machines, to owners of Kodak equipment, and, without

conditions attached, to plaintiffs and other ISOs. (Record, Docket No. 40. Dec. of Hernandez ¶¶ 15-17; Dec. of Welch ¶ 7; Dec. of Tamvacakis ¶¶ 6, 9.)

Kodak admits that with regard to micrographics parts, there were no restrictions on the sale of parts to ISOs until the restrictions on parts which were announced in an April 12, 1985 memo to ISOs. (Excerpts, pp. 2, 14-16.) This memo is discussed below at III.A.1. Kodak also sold photocopy parts to ISOs, including plaintiffs, who serviced Kodak Ektaprint photocopy machines. (Record, Docket No. 40, Dec. of Hernandez ¶¶ 15-17.) Kodak disputes this fact, saying that it did not "knowingly" sell photocopy parts to ISOs (Excerpts, p. 29, ll. 8-9.)

Customers of Kodak parts, including plaintiffs, relied on Kodak's statements, its "Replacement Parts Principles," its "Terms of Sale," and its longstanding practice of selling parts to "*any* party who intends to use them to repair Kodak equipment." In the early and mid-1980's, ISOs began setting up businesses, first for Kodak micrographics equipment repair, and then for Kodak photocopy equipment repair, both in reliance on this policy and practice. (Record, Docket No. 40, Dec. Hernandez ¶¶ 15-17; Dec. Welch ¶¶ 6-7.)

B. The Development Of Micrographics and Photocopy ISOs for Kodak Machines.

The development of independent service organizations servicing Kodak micrographics and photocopy equipment is a relatively new phenomenon. Prior to 1982

Kodak had serviced almost 100% of its own micrographics and photocopy machines. (Record, Docket No. 41, Exhibit "E," p. 5, ll. 15-22; Docket No. 40, Dec. Hernandez ¶¶ 11, 15-16; Dec. Arnold ¶ 3; Dec. Varing ¶¶ 2-4.) Independent service organizations began to compete directly against Kodak in increasing numbers in 1984 and in 1985. Of the 16 plaintiffs in this action who service micrographics equipment, 12 of them came into existence in the 1982 period or later. (Record, Docket No. 40.) These ISOs began competing head-to-head with Kodak both for private and public sector contracts, posing a threat of increased competition, and, cutting Kodak's supracompetitive prices by up to 50% (Record, Docket No. 40, Dec. Damiani ¶ 5; Dec. Hernandez ¶¶ 9-12; Dec. Tamvacakis ¶¶ 12, 18.) In the area of photocopy parts, two months after plaintiff ITS was awarded contracts by the State of California in bidding against Kodak, for the first time parts orders to Kodak by ITS were refused. (Record, Docket No. 40, Dec. Hernandez ¶¶ 15-17, 19-22.)

Because of the direct competition of ISOs, as stated by Tim Gross of Kodak's CESD, ISOs' service became a "concern" "relevant to both BISD ["Business Imaging Systems Division" of Kodak] and CESD *performance* in 1985." (Excerpts, p. 14.) Kodak's anticompetitive actions alleged by plaintiffs in the Complaint were in direct response to this development of ISOs and the challenging of Kodak's service market dominance and supracompetitive prices for service. Kodak's action began first with the purpose to slow this growth (1985), and, then with the purpose to put ISOs out of business and out of competition with Kodak (1986). (See III.F.-III.G., below.)

C. Development of ISO Businesses

1. Development of ISOs in Kodak Micrographics Competing With Kodak On Price and Quality.

Of the 18 plaintiffs, 16 are involved in the servicing of Kodak micrographics equipment. Contrary to Kodak's suggestions in the district court, these service organizations are staffed largely by experienced, quality, Kodak-trained technicians, (Record, Docket No. 40, Dec. Damiani ¶¶ 5, 7, 13; Dec. Welch ¶ 2; Dec. Hernandez ¶¶ 3-5, 17; Dec. Tamvacakis ¶¶ 4, 5). These technicians continue to update their training at their own expense. (Record, Docket No. 40, Dec. Damiani ¶ 13; Dec. Hernandez ¶ 5.) Also contrary to Kodak's assertion to the court below, many ISOs also maintain their own large inventories of replacement parts. In fact, the inventory of plaintiff B.C.S. Technical Services is greater than Kodak's in terms of parts turnover versus volume of stock. (Record, Docket No. 40, Dec. Welch ¶ 19.) The ISOs, in order to compete against the "Kodak" name, had to provide micrographics services at a higher quality and lower price, and, if consumer choice was an indication, they did so. (Record, Docket No. 40, Dec. Damiani ¶ 5; Dec. Hernandez ¶¶ 10, 48-54; Dec. Welch ¶¶ 23-25; Dec. Searle ¶ 7.)[1]

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[1] An example of the specific improvement in both quality of service and price which micrographics dealers provided over Kodak is the contract between plaintiff ITS and Computer Science Corporation ("CSC") in Sacramento, California. ITS

(Continued on following page)

2. The Development Of Kodak Ektaprint Copier ISOs

Kodak's entry into the copier-duplicator market with the Kodak "Ektaprint" equipment line is of recent origin, in 1975. (Record, Docket No. 19, p. 9.) The total population of Kodak Ektaprint copy machines was small until the 1980's, unlike Kodak micrographics machines which had been in existence for decades. As in the micrographics industry, the new Kodak Ektaprint ISOs had to compete with Kodak both on quality and price of service. Again, they found that Kodak was obtaining supracompetitive prices for substantially lower quality service than ISOs were willing to offer.[2]

(Continued from previous page)

gave CSC a $100,000 contract where Kodak had charged $200,000, and ITS gave CSC a full time, top technician where Kodak's was part time and left machines broken after service calls. (Record, Docket No. 40, Dec. Hernandez ¶¶ 48-53.)

[2] When ITS entered into head-to-head bidding with Kodak for State of California contracts with the Mental Health Department and for the Department of Transportation, the yearly maintenance costs for these Ektaprint machines were reduced to less than 1/3 of Kodak's Equipment Maintenance Agreement ("EMA") list price. Additionally, the State of California agencies experienced an improvement in service and the response time of service. ITS was cleared to bid on additional state contracts as a result of its quality service and price, and received additional contracts from the Department of Finance and Department of Health Services. (Record, Docket No. 40, Dec. Hernandez, ¶¶ 20, 24.)

II. Kodak Micrographics and Ektaprint Copier Equipment Owners Are "Locked In" Vis-a-Vis Service.

Due to a number of factors, Kodak micrographics and photocopy equipment owners are "locked-in" to Kodak equipment despite Kodak's parts/service tie-in and supracompetitive service prices. They must have Kodak parts and service to keep their equipment operational. They do not, as a practical matter, and cannot, as a matter of "economic feasibility," switch their equipment to an "interbrand" competitor of Kodak's based solely on supracompetitive prices for service. The "lock-in" factors include: (1) the large capital expenditures in equipment (compared to the relatively small service costs); (2) the low residual equipment prices if they "switch"; (3) the high cost associated with switching formats of microfilm and records; (4) the high cost of switching applications software; (5) the difficulties created by Kodak in obtaining service and reconditioning for used equipment; and, (6) the cost associated with training new operators and adapting to a different brand of machine.

A. The "Lock-In" Of Kodak Micrographics Equipment Owners.

In the area of micrographics, Kodak equipment owners, whether employing older systems or newer systems, will not switch their existing Kodak equipment for other brands simply because of supracompetitive prices in service. This is becoming increasingly so with newer, more sophisticated equipment because of the complexity of applications, the software which links various

machines and functions in the micrographics area, and peripheral equipment which is compatible only with Kodak machines. (Record, Docket No. 40, Dec. Hernandez ¶¶ 39-47; Dec. Kastner ¶¶ 5-8.)

This "lock-in" is increased by a number of other factors as to old Kodak equipment. Because Kodak may refuse to service *very* old equipment, there is often an extremely low residual value to the equipment even though it is still very serviceable. Recoupment of any portion of the high initial capital cost is difficult if an owner tries to "switch." Without ISOs, and with the possibility of no service at all from Kodak, this lock-in effect is magnified for an owner of such equipment faced with supracompetitive service prices. Because of the age and limited use made by owners of their records which are run on older machines, an equipment owner will not pay large amounts to upgrade such records to newer equipment; rather, he will endure supracompetitive Kodak service prices to keep the machines operating. (Record, Docket No. 40, Dec. Welch ¶ 23; Dec. Kastner ¶ 7.)

As a newer equipment, such as that in the sophisticated equipment and software applications of Computer Science Corporation ("CSC") in Sacramento, California, the lock-in becomes even more pronounced. CSC has over 100 pieces of Kodak micrographics equipment. Its operations are similar to large Kodak micrographics systems in operation in Blue Cross/Blue Shield, insurance companies, banks, and other large financial institutions in many states. (Record, Docket No. 40, Dec. Hernandez ¶¶ 12, 42-47.)

The system at CSC includes a combination of micrographics machines, and of computer output hardware and software tailored specifically to CSC's needs. Trading its entire equipment for an "interbrand" competitor of Kodak, due to supracompetitive Kodak service prices, would be financially unfeasible for CSC. The special software would have to be retailored at a cost of several hundred thousand dollars. Data would have to be reformatted, and operators would have to be retrained, all at a cost of hundreds of thousands of dollars. Finally, because the residual value of CSC's Kodak equipment (which is still perfectly serviceable and well within its useful life) is so low on the used market, the net cost of purchasing new equipment less the residual value of CSC's existing equipment, would be in excess of $1.5 million. In short, CSC could, and *did*, pay supracompetitive service prices for Kodak Service of almost $100,000 more per year for service for this equipment, without considering changing to Kodak's alleged "interbrand" competitors. (Record, Docket No. 40, Dec. Hernandez ¶¶ 40-54.)

B. The "Lock In" Of Kodak Ektaprint Copier Equipment Owners

Owners of Ektaprint photocopy machines are not subject to all of the complex forms of "lock in" that sophisticated micrographics systems such as CSC's involve, but the same factors apply. The useful life of Kodak Ektaprint photocopiers is generally regarded as 14 years (Kodak gives 7 years automatic availability for an annual Equipment Maintenance Agreement ("EMA"),

plus, 7 additional years of an EMA with yearly inspections). The cost of a piece of Ektaprint photocopy equipment, however, is generally considerably more than most micrographics equipment. For example, a Kodak 150AF copier costs approximately $75,000 new. In two to three years, or the expiration of 20% of its useful life, the value of the copier will have depreciated down to $2,500 to $3,500. (Record, Docket No. 40, Dec. Hernandez ¶ 56; Dec. Arnold ¶¶ 6-8; Dec. Varing ¶¶ 16-17, 20.)

A "copy shop" will have several of these $75,000+ machines. Even with supracompetitive prices for Kodak Ektaprint service that were $2,000-$3,000 above a competitive market level per machine, it is not economically realistic for a Kodak Ektaprint owner to switch to another brand of copier. The owner is "locked into" the Kodak Ektaprint machines he owns. Kodak's own actions, in progressively restricting the availability of Kodak parts, and hence ISO service, have greatly increased the effect of this "lock in" by depressing the price of used Kodak photocopy machines. (*See* Record, Docket No. 40, Dec. Arnold ¶¶ 6-8, 32; Dec. Varing ¶¶ 16-21.)

III. Kodak's Changes In Policies and Practices in 1985 and 1986.

A. Kodak's Micrographics Policy Changes.

1. The April 12, 1985 Micrographics Policy Change.

As noted above, Kodak sold all micrographics parts to all servicers, including plaintiffs, prior to 1985. In response to the growing ISO competition for Kodak

micrographics machines, however, Kodak initiated the policy set out in the April 12, 1985 memorandum of E.A. Gross, Kodak Copy Products General Manager, and J.A. Lacy, Vice-President and General Manager of Kodak's Business Imaging Systems. (Excerpts, pp. 14-16.) Under this policy Kodak cut off completely Kodak replacement parts on new products to micrographics ISOs. The effect of this, of course, was that as customers of micrographics ISOs obtained new equipment, the ISOs were totally unable to service the Kodak equipment for that customer, and, that service for such customers was lost by the ISOs. Additionally, as equipment became obsolete, and the equipment population became all "new equipment" (post April 1985 models), ISOs would be able to service no Kodak equipment at all. (Record, Docket No. 40, Dec. Damiani ¶¶ 23, 24; Dec. Welch ¶¶ 8, 22; Dec. Kastner ¶ 8; Dec. Searle ¶¶ 4, 12, 13)

2. The July 1986 O'Brien Letter.

On July 15, 1986 (and on a continuous basis thereafter as new ISOs – "BENUS" – were identified) Kodak sent out to its ISO micrographics *service* competitors (who were also *parts* "customers") a letter from Joseph O'Brien addressed to "Customer", setting out its new policy for supply of Kodak micrographics replacement parts to Kodak micrographics service *competitors*. (Excerpts, pp. 2, 4-5.) The substance of the letter stated: (1) parts would only be sold to those who "previously and regularly" purchased parts for the same equipment model (although Kodak had no way of determining this); (2) orders would not be filled from inventory but consolidated and would

be subject to an "anticipated lead time" of "90 days or more"; (3) parts purchased by Kodak on an "all time" order basis (parts which do not regularly wear out) would not be sold to ISO competitors at all; (4) no rush orders would be available to ISO competitors; and (5) the normal 10% discount for non-rush orders would not be available to ISO competitors.

Kodak referred to its competitors as "outside entities who did not purchase equipment directly from Kodak," a group for which the Kodak acronym "BENU" (Business Equipment Non-User) was dubbed. Kodak documents equate BENU directly with plaintiffs and other ISO competitors. Kodak attempts to control the supply of parts to BENU's and ultimately to destroy them included the formation of a "**tiger team**" to search out and destroy BENU's through Kodak's parts policy. (Excerpts, pp. 52-53.) This group was also charged with the determination of what parts were critical operational parts, and, with instituting delays or methods of not selling these critical parts to BENUs (Excerpts, p. 53) Statements by Kodak's personnel, including the head of Kodak micrographics division ("BISD"), John A. Lacy, indicate a clear intent to destroy Kodak's micrographics service competitors. (Excerpts, pp. 52-53; Record, Docket No. 40, Dec. Damiani ¶¶ 15, 22; Dec. Hernandez ¶ 54.)

Kodak, while identifying BENUs and severely restricting or cutting off their parts, sold parts to others across the country – so long as they were not identified as a Kodak service competitor ("BENU") and so long as they were not identified as having a service competitor installing the parts. Parts were sold to: (1) self-servicers; (2) Kodak brokers; (3) "service bureaus" (who performed

micrographic copying on their own machines for others); (4) equipment users such as financial institutions; and (5) total strangers to Kodak with no association to micrographics machines at all (such as the "China Hutch," an English China Shop, or to non-existent individuals such as "Remy Corgi," a person's dog). (Record, Docket No. 40, Dec. Searle ¶¶ 10, 11; Dec. Tamvacakis ¶ 9.5.)

Parts orders, normally available to Kodak ISO competitors on overnight or one day basis for "rush orders," and 14 days, for "non-rush" orders, were all delayed from an average of 30 to 50 days or longer. These delays had nothing to do with parts inventories, since time and again non-competitors of Kodak, on precisely parallel orders (same part, same day, same geographical area) placed by plaintiffs through non-BENUs received overnight service on parts as to which plaintiffs were told Kodak was "back ordered" or "out of stock". (Record, Docket No. 40, Dec. Searle ¶ 9.1; Dec. Tamvacakis ¶¶ 9.2, 9.3; Dec. Kastner ¶¶ 10, 11.) Parts that were represented to ISO competitors of Kodak as being "all time" parts were denied to plaintiffs, but were sold to total strangers to Kodak because the strangers were not identified as ISO competitors (Record, Docket No. 40, Dec. Tamvacakis ¶ 9.1).

As to the persons to whom Kodak sold parts, those parts were sold on the condition that the parts were not to be resold to ISO competitors or installed by them. When it was discovered Butler Office Systems had purchased parts on behalf of plaintiff Atlanta General, an ISO competitor of Kodak, and that Butler had used ISO service to install the parts, Butler's parts were cut-off. (Record, Docket No. 40, Dec. Tamvacakis ¶ 19.)

B. Changes In Kodak's Photocopy Practice

Kodak claims that, despite its "Terms of Sale" that committed it to selling *all parts* to *"any party* who intends to use them to repair Kodak equipment," it would not and did not "knowingly" sell parts for its photocopy machines to Kodak Ektaprint ISO competitors. This is a matter of factual dispute.[3]

Kodak admits, and documents show, that Kodak has continued to sell parts to "self-servicers" of Kodak Ektaprint machines – those who only service their own machines. Kodak's sale of such parts, for example, to Top Copy in Boston, Massachusetts, were expressly conditioned to Top Copy not reselling these parts to Kodak Ektaprint ISOs or going into Kodak Ektaprint service themselves. (Excerpts pp. 51, 56.) Kodak would not sell photocopy parts to Ektaprint owners if an ISO installed them, and, as to a machine not bought from Kodak, the parts were only sold under a Kodak EMA (service contract) or Kodak per call (parts and labor). (*See*, ARGUMENT, I.A.1., I.A.2., and I.A.3., *infra*.)

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[3] Paul Hernandez at ITS inquired of Kodak's CESD and was told he could purchase parts for the repair of Kodak copiers, and did so. Only after ITS competed head-to-head with Kodak on service, and the competition began to impact Kodak, did Kodak attempt to institute a detailed plan to cut-off parts to photocopy service competitors. This occurred in June, 1985, immediately after ITS's successful bids on State of California service, and just before the July 1, 1985 beginning of those contracts. (Record, Docket No. 40, Dec. Hernandez ¶¶ 15, 20-23.)

In addition, as to parts already in the marketplace, Kodak instituted a vicious campaign to prevent Ektaprint ISO competitors of Kodak from obtaining such parts. Detailed searches were made for how ITS was obtaining parts. Paul Hernandez, a former Kodak service representative with an excellent record and top technical skills, was falsely accused of ordering and stealing parts prior to his departure from Kodak. People in the industry were told that Mr. Hernandez was buying "stolen" Kodak Ektaprint copy parts. The statements were not true. (Record, Docket No. 40, Dec. Hernandez ¶ 59; Record, Docket No. 41, Exhibit "L", Kodak Docs. 2917-2920, 3058.)

An individual from Kodak's "security" forces in Rochester was sent to a Chicago leasing company, Capital Leasing, and illegally seized $25,000 worth of Kodak Ektaprint parts. (Record, Docket No. 40, Dec. Varing ¶¶ 8-11.) Additionally, the same individual from Kodak's Rochester "security" force came into the offices of CPO Limited, an Ektaprint ISO competitor in San Jose, California, demanding documents and records on a legitimately owned, brokered and resold Kodak machine, implying it too was "stolen." Again, no justification or court process was offered by Kodak for its actions. (Record, Docket No. 40, Dec. Arnold ¶ 20.)

C. Kodak's Parts Suppliers Refuse to Deal with ISOs

As a result of Kodak's cut off of parts, many ISOs attempted to purchase parts directly from Kodak's OEM parts suppliers. On non-patented parts, almost across-the-board, these parts suppliers refused to deal with

ISOs, citing arrangements with Kodak. (Record, Docket No. 40, Dec. Searle ¶¶ 15, 16; Dec. Welch ¶¶ 21, 22; Dec. Hernandez ¶ 60.) Kodak was aware of such refusals. (Record, Docket No. 41, Exhibit "L", Kodak Doc. No. 2919.)

D. Changes of Kodak's Terms of Sale and Parts Principles

Kodak changed its "Replacement Parts Principles" on December 2, 1985. This change, in part, reflected its prior changes in practice. The "Replacement Parts Principles" eliminated the statement that Kodak "will sell replacement parts to any party who intends to use them to repair Kodak equipment." Kodak modified its "Terms of Sale" on December 1, 1986, by limiting the "dealers, distributors and service outlets" to whom it would sell parts to those which were "Kodak authorized," by eliminating sales of parts to all Kodak machine owners, and by agreeing only to sell parts to "other users who purchased equipment *directly* from Kodak *and who service only their own Kodak equipment*." (Emphasis supplied.) These changes in Kodak's *written agreements* of sale reflected its revised practices to: (1) prevent purchase of parts for ISO service; and (2) cut off parts to ISO competitors in the micrographics and photocopy area. (Excerpts, pp. 39-40.)

E. Kodak Makes Substantial Profits on Parts.

Kodak in the district court advanced a "business justification" defense that it was not making a reasonable return on assets, that Kodak ISOs were "free-riding" and

that Kodak wished to save money by parts inventory control. All this is totally without factual support.

First, many ISOs have inventories of Kodak parts substantially greater than Kodak's. Plaintiff B.C.S. Technical Services, for example "turned" its parts inventory once every three years. Kodak's CESD Parts Services is able to turn its parts inventory every 60 days. (Record, Docket No. 40, Dec. Welch ¶ 19.) Other Kodak ISOs also stocked substantial parts for their service, and ordered parts well in advance.

Second, Kodak manufactures approximately 10% of its own parts. It is merely a "broker" of ninety percent (90%) of its parts which it orders, then sells at a substantial mark-up. (Record, Docket No. 41, Exhibit "L", Kodak Document Nos. 2375-2902; Docket No. 40, Dec. Welch ¶ 20; Dec. Kastner ¶ 13; Dec. Damiani ¶21.)

Further, Kodak charges ISO competitors twice what it charges for the same parts to its equipment service representatives. This price to ISOs, as of September 1, 1986 was raised by an additional 10%. Kodak's mark-up on parts sold to ISOs, where other sources are available, shows that Kodak has almost twice the mark-up of other vendors for the same parts. (Record, Docket No. 40, Dec. Damiani, ¶ 21; Dec. Kastner, ¶ 13.)

Kodak's CESD Parts Services, according to published parts policies (contrary to Kodak's implications before the district court), had *always* kept replacement parts stocks limited to its actual machine population. It "maintained [parts] . . . at a level carefully planned to fulfill Kodak's commitments" to regular servicers, self-servicers

and Kodak CESD service. (Excerpts, p. 38.) The new alleged "business justifications" offered for the 1985 reduction of parts for ISOs, were supposedly to institute parts controls. These controls had in fact existed for years and the new policy only replaced the "regular servicers" (ISOs) demand for parts with Kodak CESD's demand for parts when it took over the ISOs' service business. Both demands were the same: they simply conformed with Kodak's long-standing "Replacement Parts Principles" to stock parts for the entire Kodak machine population regardless of who serviced the machine. A simple review of Kodak's tremendous effort to attempt to ferret out its competitor BENUs, which Kodak admits resulted in less than 5% of the specially processed parts orders being denied, was considerably more expensive than any alleged savings from alleged lower parts inventories. (Record, Docket No. 41, Exhibit "L", Kodak Doc. No. 65.) It was simply geared to prevent ISO service, and to profit from Kodak service replacing it.

F. Kodak's Anticompetitive Intent

Kodak has not only manifested an anticompetitive intent in its policies and actions; it has directly stated it. The statements of Kodak's Vice-President John A. Lacy to Paul Gilbertson of CSC indicate that Kodak's BISD could control ISOs since it "has them by the balls" because of the replacement parts. (Record, Docket No. 40, Dec. Hernandez ¶ 54.) The creation of a "**tiger team**" clearly connotes predatory intent, and not a benign business interest in parts control. (Excerpts, pp. 52-53.) The illegal confiscation of parts and pressuring of ISOs are without

business justification and also demonstrate anticompetitive intent (Record, Docket No. 40, Dec. Varing ¶¶ 8-11). The timing of the parts cut-off to ITS, just after its successful bid against Kodak for State of California contracts, is likewise anticompetitive. (Record, Docket No. 40, Dec. Hernandez ¶¶ 19-23) Discussing losses to ISOs, one Kodak letter said "Parts availability for third party service is a step forward. We will need the ability to provide cost effective service as well" (Record, Docket No. 41, Exhibit "L", Kodak Doc. 3389).

G. The Effects of Kodak's Actions

The anticompetitive effects of Kodak's actions are obvious. Kodak ISOs have been unable to expand, and many have lost substantial accounts and revenues in the past two years. (Record, Docket No. 40, Dec. Hernandez ¶¶ 28, 29; Dec. Searle ¶¶ 4, 12-13; Dec. Tamvacakis ¶ 16; Dec. Damiani ¶¶ 22-23.) Customers who paid, and are paying supracompetitive prices for Kodak's service, do not have the option to bargain for lower prices and better quality service, such as Kodak owner CSC did with plaintiff ITS. (Record, Docket No. 40, Dec. Hernandez ¶¶ 46, 48-50.) ISOs, who once competed with Kodak, have gone out of business (Record, Docket No. 40, Dec. Tamvacakis ¶ 15; Dec. Hernandez ¶ 35; Dec. Welch ¶ 5).

In the Kodak photocopier area where ISOs are fewer, and more easily identified, the situation is worse. Kodak has identified most ISOs and will prevent sales of parts to anyone using their service as well as to the ISOs directly. (Record, Docket No. 41, Dec. Hennefer, Exhibit "L," Kodak Document Nos. 2912-2938.) The market for used

photocopiers has greatly diminished in number of machines, *and* in value. Owners, locked-in by the low residual values (which is not alleviated by Kodak's high trade-ins since they are then required to buy more Kodak machines), are not selling their machines, since these represent investments that, for example, cost $75,000 a few years ago and now have a value of $2500. They simply pay the supracompetitive Kodak service prices, or, rarely, risk the parts problem with an ISO (Record, Docket No. 40, Dec. Varing ¶ 17; Dec. Hernandez ¶ 41; Dec. Arnold ¶ 7).

Unlike the market for service of IBM and Xerox photocopy machines, and that of Micron, Microdesign and Fuji for micrographics machines, the market for service of Kodak equipment is moving toward a total Kodak monopoly and supracompetitive prices again. The San Francisco Bay Area, where Kodak ISO service was alive, will soon not have these competitors as to which the Kodak district manager said:

> "Kodak's price was twice that of [plaintiff] ITS. Of course we lost the bid. To date they [the customer] have received an average of two hour response time, no problems with parts, and overall are very satisfied with the quality of service they have received from ITS. (Excerpts, p. 59.)

The severe detriment to consumers in the marketplace because of the loss of such service, in terms of price, quality and availability of the product at issue – Kodak micrographics and photocopy service – cannot be seriously refuted.

STANDARD OF REVIEW

This Court is to "review *de novo* the district court's grant of summary judgment, viewing the evidence in a light most favorable to the losing party," plaintiffs-appellants. *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1477 (9th Cir. 1986); *Compton v. Ide*, 732 F.2d 1429, 1434 (9th Cir. 1984).

Summary judgment is generally disfavored in antitrust litigation. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962); *Dimidowich, supra*, 803 F.2d at 1477.

In *Poller*, the Supreme Court cautioned against the improper use of summary judgment in complex antitrust cases, stating:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice." 368 U.S. at 473.

Summary judgment may be an appropriate method to test the validity of the underlying antitrust theory in certain cases, but only if – without controverting the validity of the plaintiff's factual contentions – the acts of defendant, do not amount to an antitrust violation as a matter of law. *See, Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977). This is not the case here.

The case of *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986) has not changed this principle one iota, but has reinforced it.

There, plaintiffs' claim of predatory pricing was found to be implausible and to make no economic sense even if all the facts asserted were true. Here, it is Kodak's "defense" of "interbrand" competition, in the situation when a Kodak machine owner needs parts and service for his machine that is broken down, that makes no economic sense. As this Court stated as to a similar "defense" in *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986):

> " . . . an owner of broken B & H micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the owner's only option is to request service from B & H or Comgraphix . . . that is obviously the market the owner faces." *Id.* at 1480-1481 n.3.

The Ninth Circuit also reaffirmed the validity of *Poller* in *Dimidowich*:

> Although summary judgment generally is disfavored in antitrust litigation, [citations omitted] it appropriately may be granted if the nonmoving party does not show any issues of material fact and does not present an adequate record to support a finding in his favor. *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1260 (9th Cir.), *cert. denied*, 464 U.S. 956, 104 S.Ct. 385, 78 L.Ed.2d 331 (1983).

Where, as here, valid antitrust theories are alleged, the district court conceded plaintiffs' relevant market for purposes of its decision and there is substantial evidence of anticompetitive intent and anticompetitive effect (which evidence is claimed by defendant to be insufficient as a matter of law) summary judgment should be sparingly granted. *See, e.g., Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Impro Prods, Inc. v. Herrick*, 715 F.2d 1267 (8th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984);

Battle v. Lubrizol Corp., 513 F.Supp. 995 (E.D. Mo. 1981), *aff'd by equally divided court* (en banc), 712 F.2d 1238 (8th Cir. 1983), *cert. denied*, 466 U.S. 931 (1984).

SUMMARY OF ARGUMENT

I. SECTION 1, SHERMAN ACT.

Under Section 1 of the Sherman Act, Kodak's policies and practices of: (1) refusing to sell parts to a customer if he uses ISO service and (2) selling parts to used machine purchasers and others only if they agree to purchase Kodak service, are classic tying arrangements under *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958). Kodak is tying service (the tied product) to parts (the tying product). Kodak admits it has a natural monopoly over these parts. Whether the tying arrangement is a *per se* violation under *Digidyne Corp. v. Data General Corp*, 734 F.2d 1336 (9th Cir. 1984), or, is merely an unreasonable restraint of competition under the rule of reason involves material issues of fact.

II. SECTION 2, SHERMAN ACT.

As a monopolist in replacement parts, Kodak may not refuse to deal with a parts *customer* who is also a *competitor* in a different area (and at a different level of distribution) like service, where its change in a long-standing policy "unnecessarily excludes or handicaps competitors." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). The Ninth Circuit has long recognized that the antitrust laws impose duties on a monopolist to sell to an existing customer under certain

circumstances even if that means aiding its competitors. *Pacific Coast Agricultural Export Ass'n. v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). *See Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir. 1988).

ARGUMENT

I. KODAK'S AGREEMENTS WITH ITS EQUIPMENT OWNERS CONSTITUTE AN ILLEGAL TYING ARRANGEMENT UNDER SECTION 1 OF THE SHERMAN ACT, AND THIS COURT'S *DIGIDYNE* OPINION REQUIRES REVERSAL.

As noted above, the district court's summary judgment was granted without oral argument. Perhaps as a result of this lack of argument, the district court's memorandum opinion significantly misstates the facts and misapplies the law of this Circuit with respect to plaintiffs' tying claims. As demonstrated here, admissions in defendant Kodak's own declarations and its own documents, when analyzed under the microscope of the Supreme Court's rule in *Northern Pacific Ry.* and this Court's rule in *Digidyne*, require reversal of the judgment of the district court.

A. Kodak Service Is Tied To Kodak Parts.

Kodak's written "Terms of Sale" and the declarations Kodak submitted in support of its motion for summary judgment establish that Kodak's policy is to refuse to sell replacement parts (the tying product) for its equipment to those owners who desire to purchase service (the tied product) from an ISO. The district court came close, but

did not quite grasp, this fundamental and crucial fact upon which plaintiffs' tying claims turn. The opinion notes that:

> With respect to copier-duplicators, Kodak has since 1975 not knowingly sold parts to anyone other than direct purchasers of that equipment.

(Excerpts, p. 65, ll. 13-15.)

The opinion goes on to find that:

> Since 1985, Kodak has also sold imaging [micrographic] equipment parts only to purchasers of such equipment, with certain qualifications not material here.

(Excerpts, p. 65, ll. 19-21.)

The opinion also finds that:

> The effect of these practices is to generally bar sales of parts required to repair and maintain Kodak copiers and imaging equipment to plaintiffs and other ISO's.

(Excerpts, p. 66, ll. 1-3.)

But in reaching the tying claim, the district court *erred* in stating: "A Kodak customer . . . can buy parts if he simpiy owns Kodak equipment." (Excerpts, p. 68, ll. 11-13.)

That statement is flatly wrong and is contradicted by submissions in the record below from both Kodak and plaintiffs. A Kodak customer *cannot* "buy parts if he simply owns Kodak equipment." There are three major exceptions to this statement which Kodak *admitted*: (1) The customer cannot buy parts if it uses an ISO to service its equipment (the "ISO-serviced owner"); (2) The customer cannot buy parts if it acts as an ISO and installs those

parts in another party's machine (the "owner – ISO"); (3) The customer cannot buy parts alone, but only parts *and* service, if it purchased Kodak equipment from a seller other than Kodak (the "brokered-equipment owner"). In each of these cases, the customer can buy parts only on the condition that it not buy service from an ISO, or, that it buy both parts *and* service from Kodak.

The district court's misunderstanding of Kodak's *conceded* restrictions on sales of its parts resulted in an incorrect application of the law, and an erroneous granting of summary judgment. Kodak's refusal to sell parts to the ISO-serviced owner, the owner-ISO and the brokered-equipment owner, *unless* those owners *also* refuse ISO service or purchase Kodak service, constitutes a tying arrangement which under the circumstances here is illegal *per se* and constitutes an unreasonable restraint on competition.

1. A Kodak Machine Owner Cannot Buy Parts If It Uses ISO Service.

Kodak admits it will not sell parts to an ISO-serviced owner. Kodak's "Replacement Parts Principles," newly instituted on December 2, 1985, state that parts levels were carefully planned only for, *inter alia*, "users of Kodak equipment *who service their own equipment*." (Excerpts, p. 40, emphasis supplied.)

Kodak's "Terms of Sale" for replacement parts, newly instituted on December 1, 1986, clearly state that Kodak parts are stocked only for users "who service only their own Kodak equipment." (Excerpts, p. 39.)

As Kodak's BISD Vice President and General Manager, Mr. John A. Lacy, swore in his declaration in support of Kodak's motion for summary judgment:

> Kodak's customers are free to obtain service from ISOs or to perform their own service; *in the latter case* they may freely obtain parts from Kodak.

(Excerpts, p. 26, ll. 9-11, emphasis supplied.)

Michael J. Murray, another Kodak declarant on its motion for summary judgment who is Vice President and General Manager for the Kodak Copy Products Division, stated:

> It is Kodak's business practice to sell parts, publications and tools for the repair and maintenance of our copiers only to our direct copier customers *who want to service their own equipment*.
>
> * * *
>
> In fact, customers have the option of purchasing Kodak service (on either a per call or EMA basis) or ISO service, or servicing their own copiers. *If they choose to service their own*, they may obtain parts from Kodak.

(Excerpts, p. 19, ll. 16-19 and p. 20, ll. 6-9, emphasis supplied.)

In other words, if the Kodak customer "chooses" not to service its own equipment, but rather purchases service from an ISO, the customer *cannot* obtain parts from Kodak. This was confirmed in the deposition of Lynn M. Gleason, Kodak's replacement parts coordinator, who admitted that Kodak would *not* sell parts to a Kodak customer who purchased equipment from Kodak but used an ISO to install those parts:

Q. Okay. Can self-servicers buy parts for Ektaprint photocopy machines *to be installed by a third-party service organization*?

. . .

A. A customer *who is servicing their own equipment* can buy parts from Kodak, *period*.

Q. And when you say "period," you mean, don't you, that *they have to put them in their own machine*?

A. *Yes*.

. . .

MR. WALL [the witness' attorney]: . . . [He is asking you] [w]hether as a matter of policy Kodak will sell to a customer so that they may have an *independent service organization service that customer's machine*.

A. Well, *that's not consistent with self-servicing*.

(Excerpts, p. 49, l. 16 – p. 50, l. 19, emphasis supplied.)

Kodak's interrogatory responses confirm this. When asked whether Kodak sold replacement parts to direct purchasers of Kodak equipment for servicing of that equipment by "independently contracted labor," Kodak responded:

> [A]ssuming that "independently contracted labor" refers to ISOs: Kodak prefers not to sell newer micrographic equipment parts or copier parts under these conditions. However, Kodak has no effective means to prevent direct equipment customers from purchasing parts, ostensibly to perform their own service, when in fact they have an ISO service their equipment. Kodak suspects that it has sold parts to its customers under these conditions.

(Excerpts, p. 30, ll. 14-18 and p. 31, ll. 5-13.)

Documents produced by Kodak and relied on by plaintiffs in the district court confirm that Kodak was quite successful in achieving its "preference" not to sell parts to ISO-serviced owners. These documents prove that Kodak routinely implemented this policy and regularly refused to sell parts to its customers who purchased equipment from Kodak but preferred to use ISO service. For example, when a bank which "own[ed] their own copier" and "purchased it from [Kodak]" needed a part and wanted an ISO to install it, Kodak's Ms. Gleason told the ISO "we [Kodak] will not be selling them [the ISO] the part" but that "we would sell [the bank] the part *if [the bank were] servicing the unit themselves*." (Excerpts, p. 57, emphasis supplied.)

Thus, Kodak admits that it has an agreement with each purchaser of its copier or micrographic equipment that it will not to sell parts unless the equipment owner agrees not to buy service from an ISO. This is a black-letter-law tying arrangement and, as demonstrated below, constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. A Kodak Machine Owner Cannot Buy Parts If It Is An ISO.

A necessary corollary to Kodak's requirement that a Kodak machine owner may not buy parts if it uses an ISO to install them is that the customer may not act as an ISO on other parties' machines or sell the parts to an ISO. Kodak's Ms. Gleason confirmed that "[owners] have to put [the parts] in their own machine." (Excerpts, p. 49, l. 25 – p. 50, l. 3.) For example, with regard to "Top Copy"

and "Legal Copy Center – Harvard Law School" in Boston and Cambridge, Massachusetts, Ms. Gleason stated:

> "10/21/85 . . . [T]here is a possibility that Legal Copy/Top Copy is expanding their services by offering Facilities Management [for others], and that they may be performing service on the units in addition to actually making the copies. . . . if we can confirm this situation, that Legal Copy has become a competitor, . . . we will no longer sell them Copy Parts."

(Excerpts, p. 56.)

3. A Kodak Brokered-Machine Owner Cannot Buy Parts Unless It Buys Kodak Service.

Kodak admits it will not sell parts to a brokered-equipment owner. Kodak will *only* sell such a customer an Equipment Maintenance Agreement ("EMA") or "per call" service whereby they are supplied with both parts and service. Kodak's Mr. Lacy declared:

> [W]e [Kodak] decided that we would not sell parts on new micrographic products . . . except to direct Kodak equipment customers.

(Excerpts, p. 24, l. 23 – p. 25, l. 1.)

Kodak's Mr. Murray declared that Kodak's copier parts policy is the same:

> We [Kodak] do not knowingly sell parts, publications or tools to . . . individuals or firms who wish to service Kodak copiers they have purchased from sources other than Kodak.

(Excerpts, p. 19, ll. 19-23.)

Kodak's interrogatory responses succinctly state this policy:

> Kodak does not knowingly sell newer micrographic parts or copier parts, other than pursuant to an EMA [a Kodak service agreement] or an [sic] a per call [Kodak service] basis, to persons who do not own micrographic or photocopy equipment which they purchased directly from Kodak.

(Excerpts, p. 29, ll. 8-12.)

As with its ISO-serviced policy, Kodak is highly efficient in policing its brokered-equipment policy to insure that no owner of Kodak equipment purchased from a non-Kodak source can buy parts. Kodak documents relied on by plaintiffs below are replete with examples of Kodak personnel utilizing sophisticated computerized serial-number tracking systems to insure that Kodak does not sell parts to brokered-equipment owners who do not also use Kodak service. For example, records of Kodak's Ms. Gleason stated:

> 2/26/87 Carm from PS [Parts Service] had called me 2/13 at 5:00 and asked me to check on this company [Copier Services Unlimited] who had placed a part order for a unit they bought from CPO Ltd. [a broker]. S/N 468230 150AF. . . . I called the district in Kansas City and they said they do not have a customer called Copier Services Unlimited and I asked to have SCAN check the S/N and I was told that we don't have a unit by that serial number. So I called Jim Murphy to inform him that we only sell copier parts to Copy Product customers who purchase their equipment from Kodak.

(Excerpts, p. 55.)

Kodak's Ms. Gleason further stated:

> Kodak supports their customers . . . we would not sell them parts if they purchase the unit from a broker and service the unit themselves because as far as Kodak is concerned, we are not involved in any of these transactions and do not recognize them as a customer.

(Excerpts, p. 54.)

Kodak's refusal to sell parts to a brokered-equipment owner unless the owner also buys Kodak service constitutes a tying arrangement, just as does Kodak's refusal to sell parts to ISO-serviced owners.

B. The Tying Standard of Northern Pacific.

The district court quoted the long-standing Supreme Court definition of a tying arrangement given in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958):

> A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he will not purchase that product from any other supplier.'

(Excerpts, p. 67, l. 21 – p. 66, l. 3.)

Unfortunately, because the court below did not understand that Kodak's policy is to sell parts to owners *only on the condition* that: 1) they purchase parts *and* service from Kodak; *or* 2) that they agree not to purchase service from an ISO, the court failed to recognize that Kodak's agreements fall within the literal language of both the first ("on the condition") and the second ("or at least") clauses of *Northern Pacific's* definition of a tying arrangement. To

paraphrase the *Northern Pacific* definition, there is admittedly here "an agreement [with owners of Kodak's equipment] by a party [Kodak] to sell one product [parts] but only on the condition that the buyer purchase a different (or tied) product [service or brokered machines] or at least agree that it will not purchase that product [service] from any other supplier [i.e., an ISO]."

As noted above, Kodak will only sell parts *and* service together for brokered equipment. Further, Kodak admits that it will sell replacement parts alone to an owner who purchased its equipment directly from Kodak *only* if the owner physically installs those parts itself, *i.e.*, provides its own service and hence does not buy service, the tied product, "from any other supplier, such as a plaintiff ISO" The owner must also install all parts it purchases in its own machine, and not, as Ms. Gleason said, "become a competitor" with those parts. The owner has but two choices to buy parts from Kodak: 1) buy parts from Kodak and fix its purchased-from-Kodak equipment itself, or 2) buy *Kodak* service, in which case it also obtains parts for its equipment. But it cannot buy parts from Kodak, hand them to its ISO, and have that ISO install the part for less than Kodak charges. *That* is a tying arrangement, which effectively ties Kodak service to Kodak parts. Kodak parts *cannot* be purchased separately from Kodak service by ISO-serviced owners, by ISO-owners, or by brokered-equipment owners.

C. The Existence of Kodak's Admitted Tying Arrangement Requires Reversal to Afford Plaintiffs the Opportunity to Show Unreasonable Restraint of Competition or Per Se Illegality Under Digidyne.

1. Triable Issues of Fact Exist with Respect to the Unreasonable Restraint of Competition Engendered by Kodak's Tying Arrangement.

Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984), *cert. denied* 473 U.S. 908 (1985), reiterated the well-established proposition that:

> A tying arrangement is illegal if it is shown to restrain competition unreasonably or is illegal *per se*, without such a showing, if certain prerequisites are met.

734 F.2d at 1338.

Here, because the district court did not recognize that Kodak's agreements with equipment owners constituted an arrangement tying Kodak service to Kodak parts, it incorrectly concluded that "plaintiffs have not demonstrated the existence of a tying arrangement." (Excerpts, p. 67, ll. 20-21.) Accordingly, because of this incorrect factual understanding, the district court dismissed plaintiff's tying claims without ever reaching the question of whether these arrangements are illegal, because they restrain competition unreasonably, *or* are illegal *per se* because the required prerequisites are met. Reversal is required on this ground alone, to afford plaintiffs discovery and trial on the issue of whether Kodak's tying arrangement unreasonably restrains competition.

However, because plaintiffs' showing in opposition to Kodak's motion for summary judgment did, in fact, demonstrate the existence of triable issues of fact regarding the three prerequisites for *per se* illegality of a tie-in, plaintiffs proceed, in this brief, to discuss those three elements. Plaintiffs demonstrate, at a minimum: that triable issues of fact exist with respect to each element, that plaintiffs came forward with evidence showing the existence of each element, that summary judgment was therefore improperly granted, and that the judgment below must be reversed.

2. Triable Issues of Fact Exist with Respect to the *Per Se* Illegality of Kodak's Admitted Tying Arrangement.

As *Digidyne* states,

> The prerequisites of *per se* illegality are: (1) separate products, the purchase of one (tying product) being conditioned on purchase of the other (tied product); (2) sufficient economic power with respect to the tying product to restrain competition appreciably in the tied product; and (3) an effect upon a substantial amount of commerce in the tied product.

734 F.2d at 1338.

a. Parts and Service Constitute Separate Products.

The first element, separate products, is satisfied here. The tying product of parts is separate and distinct from

the tied product of service. A service constitutes a "product" for purposes of a tying arrangement under the Sherman Act. *Northern Pac. R. Co. v. U.S.*, 356 U.S. 1, 3 (1958) (railroad shipping services constituted tied product). The test of whether the alleged separate products constitute one or two products "turns not on the functional relation between them, but rather on the character of the demand for the two items," *i.e.*, that there are "two distinct markets for products that were distinguishable in the eyes of buyers." *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 19 (1984). Kodak's admission that many of its equipment owners would prefer to purchase service from ISOs while purchasing parts from Kodak (if Kodak's tying arrangement did not prohibit it) demonstrates that the parts and service are clearly distinguishable products in the eyes of buyers. (*See* testimony of Kodak witnesses Lacy, Murray and particularly Gleason, quoted above. (pp. 22-26.)

Despite these admissions of its personnel, Kodak in its reply memorandum below made a half-hearted effort to suggest that customers view parts and service as the same product:

> Similarly, there is no demand for parts distinct from the demand for service. Parts have no utility or economic value unless they are used to service the equipment that is made up of those parts. Parts are not a separate product to which either equipment or service can be tied.

(Excerpts, p. 62, ll. 11-16, footnote omitted.)

While this argument is clearly sophistry and is not based on *evidence*, at a minimum it raises a triable issue of fact, requiring reversal of Kodak's summary judgment.

b. Kodak Possesses Sufficient Economic Power With Respect to Parts to Restrain Competition in Service.

Plaintiffs also made a sufficient showing that there are triable material issues of fact on the second element of a *per se* violation: Kodak's "possession of sufficient economic power with respect to the tying product," which in this case is replacement parts. *Digidyne, supra*, 734 F.2d at 1339.

As *Digidyne* teaches, possession by the seller in a *per se* tying case of "monopoly power is sufficient to establish *per se* illegality, *but it is not required.*" *Id.* at 1339-340 (emphasis supplied). Rather,

> [T]he crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

Id., at 1340, *quoting U.S. v. Loews, Inc.*, 371 U.S. 38, 45 (1962).

In further analyzing the economic power needed, this Court in *Digidyne* turned to the Supreme Court's decision in *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 502-04 (1969) (*Fortner I*), and emphasized:

> The standard of 'sufficient economic power' does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and *even though the power exists only with respect to some of the buyers in the market*. . . .

> [T]he presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results *whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market.*

Digidyne, supra, 734 F.2d at 1340 (emphasis by the Ninth Circuit).

Relying on the Supreme Court's latest pronouncement on *per se* tying arrangements, *Jefferson Parish, supra,* this Circuit in *Digidyne* declared:

> [A] tying arrangement is illegal *per se* if the seller of the tying product has the capacity to *force* some buyers to purchase a tied product they do not want or *would have preferred to purchase elsewhere.* When such forcing occurs "competition on the merits in the market for the tied item is restrained." *Jefferson Parish Hospital,* ___ U.S. ___, 104 S.Ct. at 1558 (1984). Thus, what is required in a *per se* case is not power over the whole market for the tying product, but only as the Court said, a "type of market power [that] has sometimes been referred to as 'leverage . . . defined here as a supplier's *ability to induce his customers for one product to buy a second product from him that would not be purchased solely on the merit of that second product.*' " *Id.* at 1559 n. 20 quoting V.P. Areeda & D. Turner, *Antitrust Law,* ¶1134a at 202 (1980). "[W]e have condemned tying arrangements," the Court said, "when the seller has *some special ability* – usually called 'market power' – *to force a purchaser to do something that he would not do in a competitive market.*" *Id.* at 1559.

Digidyne, supra, 734 F.2d at 1340-41 (emphasis supplied).

Jefferson Parish, supra, provides an excellent and exhaustive analysis of the degree of "economic power" in the tying product (parts) necessary to restrain competition appreciably in the tied product (service). Applying the words of *Jefferson Parish* (adopted by this Circuit in *Digidyne*) to the facts at bar, Kodak must be shown to have "*some special ability* . . . to *force* a purchaser to do something he would not do in a competitive market." *Jefferson Parish, supra,* 466 U.S. at 13-14 (emphasis supplied).

The Supreme Court in *Jefferson Parish* identified a variety of "special abilities to force," a number of which apply here. As is first example, it reasons that "if the Government has granted the seller a *patent* or *similar monopoly* over a product, it is fair to presume that the inability to buy the product *elsewhere* gives the seller market power." 466 U.S. at 16 (emphasis added). Here, some of Kodak's parts (and service manuals) are patented (or copyrighted). Kodak's current ability to refuse to sell its parts directly to ISOs and to require manufacturers of its parts to so refuse, creates a "similar monopoly" in Kodak parts which precludes anyone from purchasing Kodak parts "elsewhere." While plaintiffs accept the district court's observations that "Kodak has, of course, a natural monopoly over the market for parts it sells under its name" and that in some instances, "the right of a manufacturer unilaterally to select its customers and to refuse to sell to others is well-established . . . " (Excerpts, p. 71, ll. 1-2, p. 68, ll. 21-23), cases holding that do not validate a tying arrangement by a seller of unique parts. Rather, Kodak's natural monopoly assists plaintiffs on

their tying claim in demonstrating Kodak's "ability to force."

Moreover, the uniqueness of Kodak's parts – alone – constitutes another basis recognized by the Supreme Court for demonstrating Kodak's power in the tying product market. *Jefferson Parish, supra,* 466 U.S. at 17. Kodak itself in its interrogatory responses refers to its "unique" parts: "Kodak has never intentionally deviated from its policy not to sell unique copier parts to independent service organizations." (Excerpts, p. 28, ll. 14-15.)

Although the recognition by the court below that Kodak has a "natural monopoly over the market for parts it sells under its name. . . . " (Excerpts, p. 71, ll. 1-2) may not, as the district court held, impose a "duty" on Kodak to sell to plaintiffs, it *does* raise triable issues of fact as to whether that natural monopoly gives Kodak "some ability to force" its equipment owners to buy its service by reason of its tying arrangements.

Finally, plaintiffs' proferred evidence on these factual issues – which was never discussed by the district court – is substantial. Plaintiffs have shown that many of Kodak's equipment owners "would have preferred to purchase [service] elsewhere," namely, from plaintiff ISOs, but could not because then Kodak would not sell them parts. (Record, Docket No. 40, Dec. Hernandez ¶¶ 24, 30-32, 35; Dec. Damiani ¶¶ 4-5, 11; Dec. Welch ¶¶ 23-25.) Plaintiffs have shown that Kodak has the "ability to induce [its] customers for one product [parts] to buy a second product [service] from [it] that would not be purchased solely on the merit of that second product," because Kodak's service was inferior to and costlier than that of the ISOs.

As Kodak's own documents concede: "Third party providers [ISOs] are offering service at 30% less and providing in the customers [sic] eyes comparable service. Service is being provided by two former Kodak ESR's who are well trained and talented." (Excerpts, p. 58.) And plaintiffs showed that Kodak had "some special ability . . . to force a purchaser [of parts] to do something he would not do in a competitive market," namely, buy Kodak's supracompetitively priced service, because parts are unavailable to the equipment owner who rationally prefers an ISO's competitively priced service. (Record, Docket No. 40, Dec. Hernandez ¶¶ 24, 30-33, 35; Dec. Damiani ¶ 4-5, 11; Dec. Tamvacakis ¶¶ 12-13.)

i. A *Digidyne* "Lock-In" Enhances Kodak's Power Here.

This Court further explained that plaintiffs in *Digidyne* had shown, after a full-blown trial on the merits, that the "power to coerce" which the tying product gave to the defendant "was enhanced by the fact that many of defendant's customers were 'locked in' to the use of [the tying product]," in part because of a sizeable economic investment. 734 F.2d at 1342. In their showing in opposition to Kodak's summary judgment motion, plaintiffs here made an analogous showing that Kodak's customers, the Kodak equipment owners, were "locked in" to Kodak equipment and the use of Kodak replacement parts by a similar economic investment. Such a "lock-in" both shows: (1) a relevant market in service for Kodak equipment because a Kodak equipment owner will not switch to an interbrand competitor because of a supracompetitive service price (see *Dimidowich v. Bell & Howell,*

803 F.2d 1473, 1481 n.3 (9th Cir. 1986), *and* (2) enhanced market power in the tying product, parts for Kodak machines, because a Kodak equipment owner cannot escape its requirement for such parts if it is economically "locked-in" to its Kodak machine. In showing this "lock-in" in the district court, plaintiffs were essentially "gilding the lily," proving their case was on all fours with *Digidyne*, right down to the "lock-in enhancement," when all they needed to do was show that triable issues of fact existed.

The district court totally misapprehended this "lock-in" argument of plaintiffs. It did not recognize that plaintiffs were arguing that they too had the same kind of "lock-in enhancement" recognized in *Digidyne*, but misconstrued their argument to be that the economic "lock-in" at bar somehow *created* or *constituted* the tying arrangement. Needless to say, the tying arrangement in this case was created by Kodak's expressed policy to refuse to sell its equipment owners parts if they purchased non-Kodak service or if they purchased brokered equipment without Kodak service. *Those* are the tying arrangements, wholly apart from any *Digidyne* lock-in enhancement.

In *Digidyne*, the defendant's tying arrangement was "enhanced" because its customers had incurred "substantial expense" in establishing systems that required defendant's tying product in order to operate. 734 F.2d at 1342. Because of the tying arrangement, the *Digidyne* customers had to purchase the tied product along with the tying product, even though they only desired the latter. Their investment of "substantial expense" in their systems, in the words of this Court, constituted a "lock-in" which

made it economically unfeasible to escape. A *Digidyne* customer could

> [F]ree itself from this "lock-in" only by abandoning its application software compatible with [the tying product,] defendant's RDOS, in which it has a substantial investment, or converting the software so that it may be used with another operating system. There was abundant testimony that conversion was not economically feasible.

Id. at 1342 (footnote omitted).

The situation at bar is identical. Kodak's customers have made a substantial investment in their Kodak equipment. The equipment is useless without the tying product, Kodak parts. While these customers can, *in theory*, abandon their Kodak equipment and replace it with that of a Kodak competitor, there was "abundant" evidence adduced by plaintiffs below on the motion for summary judgment that such "conversion" is "not economically feasible." (Record, Docket No. 40, Hernandez Dec. ¶ 56; Arnold Dec. ¶¶ 6-7; Varing Dec. ¶¶ 16-20.)

Apparently because it did not recognize Kodak's tying arrangement for what it was, the district court mistakenly thought plaintiffs were attempting to *establish* a tying arrangement *by means of* a "lock-in" argument. Perhaps this explains the court's curious statement,

> The case [*Digidyne*] has nothing to do with the present situation in which customers who have purchased Kodak equipment in a competitive market will tend to retain that equipment for its economic life.

(Excerpts, p. 70, ll. 3-7.)

Indeed, that statement is completely opposite to *defendant Kodak's own declarations* on summary judgment. Kodak implausibly swore that Kodak equipment owners will *not* retain their equipment for its economic life but rather will instantly rip out their installations and purchase competing equipment the minute Kodak tries to extract a supracompetitive price on its service which is admittedly tied to its parts. "Our [Kodak's] customers would simply switch to other equipment makers" if Kodak were to charge "monopolistic levels" on its "service prices." (Excerpts, p. 23, ll. 20-24.) Plaintiffs wholeheartedly agree with the district court's finding that Kodak equipment owners will tend to retain that equipment for its economic life, because this finding buttresses rather than undermines plaintiffs' "lock-in" enhancement argument.

That finding will assist plaintiffs' case upon remand. Under the reasoning of *Digidyne*, Kodak's power to coerce its equipment owners is enhanced by the "lock-in" comprised of their sunken costs in Kodak equipment.

ii. Development Cost Recoupment Does Not Justify Kodak's Tie.

Kodak argued below, and will doubtless argue here, the spurious proposition that it is required to tie its service to its parts (or "bundle" them, in industry jargon) in order to recoup the costs of parts development. Not even the district court accepted this bogus defense, for as this Court reiterated in *Digidyne*:

> The district court properly rejected defendant's argument, vigorously renewed in this court,

> "that it must bundle its software together with its CPUs in order to recover its substantial investment in software research and development," (490 F.Supp. at 1121), and that "it would be unfair to permit emulator-CPU manufacturers to reap the benefits of [defendant's] software [research and development] when they sell their competing CPUs for use with [defendant's] software." 490 F.Supp. at 1121-22.
>
> . . . Rather than sell the software separately at a price that would reflect research and development, defendant chose to restrict availability to its own CPU customers, thus restricting competition for the tied product. As the district court said, *"Recovery of investment costs has been explicitly excluded from the narrowly-construed exceptions to the per se rule against tie-ins." Id.* at 1122. . . .
>
> . . . In short, defendant must recover the cost of RDOS development by pricing RDOS appropriately, not by tying it to a separate product.

734 F.2d at 1343-44 (emphasis supplied).

Indeed, plaintiffs below offered *unrebutted* evidence that Kodak was *already* selling replacement parts to ISOs at prices *double* that charged its equipment owners who pay on a time and materials basis before it instituted its tying arrangement which completely cut off Kodak equipment owners who utilized ISO service. (Record, Docket No. 40, Dec. Tamvacakis ¶ 19; Dec. Welch ¶ 20.) Presumably, this 100% surcharge more than recompensed Kodak for its R&D costs, and at a minimum raises a triable issue of fact. Kodak's conceded ability to recoup its R&D costs through its parts pricing structure makes Kodak's institution of its tying arrangement all the more

egregious, and demonstrates Kodak's pristinely anticompetitive motive.

iii. Customer Choice Does Not Justify Kodak's Tie.

Lastly, Kodak argued, and the court below noted, that Kodak can sell parts to whomever it wants. The *Dimidowich* district court reasoned that "logical application" of distributor-termination cases such as *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972) leads to the conclusion that a "manufacturer can, in effect, choose itself as the sole distributor of its own goods consistent with these [two] principles [legal choice of customers and development of distributorship systems], *absent impermissible methods and effects.*" *Dimidowich, supra,* 590 F. Supp. at 50 n.7 (emphasis supplied). Illegal tying arrangements are "impermissible methods." Thus, although Kodak, as sole distributor of its own parts, might not run afoul of Sherman Act Section 1 merely by "choosing" its own customers, Kodak *does* violate that law if, in "choosing" its parts customers, it forces those customers also to buy its service by means of an "impermissible method," such as its tying arrangements. Any ability of Kodak legally to refuse to deal with ISOs does not insulate it from liability for illegally tying its service to its parts.

c. Relevant Markets Exist in Parts and Service, and Kodak's Tying Arrangement Affects A Substantial Volume of Service.

The third element of a *per se* tying arrangement is a showing of "an effect upon a substantial amount of

commerce in the tied product." *Digidyne, supra,* 734 F.2d at 1338. An examination of this element involves an inquiry into the market for the tied product. Curiously, the district court nowhere in the portion of its discussion of plaintiffs' Section 1 claims, including the tying claims, addressed the market issue. Only in its discussion of plaintiffs' Section 2 claims did it consider the question:

> Plaintiffs contend that Kodak has a dominant share of a purported market for servicing Kodak copiers and micrographic equipment. Assuming without deciding that such a market can be found to exist and that Kodak has market power in it, plaintiffs have not come forward with any facts to suggest that Kodak has attempted to leverage power in that market to gain competitive advantage in another market.

(Excerpts, p. 70, ll. 20-26)

Because it did not grasp Kodak's tying arrangement, the district court did not recognize that it is Kodak's power in the *parts* market which it is "leveraging" to gain competitive advantage in the *service* market. However, the lower court's "assumption" that Kodak has a dominant share of the market for servicing Kodak equipment is, in fact, consistent with this Court's *Digidyne* reasoning:

> More basically, the [district] court was misled by its conception that power throughout the product market for the tying product was required.
>
> * * *
>
> As the authorities cited earlier establish, the focus of the prohibition against tying arrangements is quite different. The concern is *not with the restraint on competition in the tying product but on competition in the market for the tied product.*

> What is required is not monopoly power in the tying product market, but only sufficient power to enable the seller to restrict competition in the tied product. If a seller's product is distinctive, not available from other sources, and sufficiently attractive *to some buyers* to enable the seller by tying arrangements to foreclose a part of the market for a tied product, *the adverse impact on competition in the tied product is not diminished by the fact that other sellers may be selling products similar to the tying product.*

734 F.2d at 1344-45 (emphasis supplied).

In its summary judgment motion, Kodak repeatedly argued that "interbrand competition" in copier and micrographic equipment at the point of sale somehow results in competition in the market for replacement parts for each brand of machine. Kodak asserts that because there is much competition in the market for machines, there is implictly competition in the market for parts; therefore, Kodak has no market power in the parts market, and, as a result, its tying arrangement is not illegal. This does not follow. Putting aside its customers' economic lock-in, which destroys Kodak's "competition for machines therefore competition for parts" non-sequitur, *Digidyne* teaches that, in a tying case, the focus is not restraint of competition in the *tying*-product market (parts), but in the *tied*-product market (service). And with respect to *that* market,

> [A] detailed analysis of competitive conditions in the tied product market is inappropriate in a *per se* case. Indeed as the district court held in its first opinion, *see*, 490 F.Supp. at 1116-17, all that is required in respect to the extent of the restraint in the market for the tied product is

> that a "substantial *volume* of commerce be foreclosed," *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. at 1560 (emphasis added); and "substantial volume" in this context means only an amount greater than *de minimis*, a requirement clearly satisfied here. *See* 490 F.Supp at 1117.

Digidyne, supra, 734 F.2d at 1347.

Clearly, the "market for *servicing* Kodak copiers and micrographic equipment," assumed by the district court, is the relevant market in which to analyze restraint on competition for plaintiffs' tying claim, and this record contains abundant evidence to raise triable issues of fact regarding the existence of that market *and* Kodak's "foreclosure" of a "greater than *de minimis*" portion thereof by means of its tying arrangement. (*See* testimony of Kodak's own witnesses quoted at pp. 22-26 hereof, and of plaintiffs at pp. 16-17.)

Kodak's moving papers below carefully avoided any assertion as to whether its parts or service constituted distinct markets: "Kodak does not base this motion on the ground that a Kodak service market does not or cannot exist as a matter of fact or law." (Excerpts, p. 61, ll. 10-12.) Kodak's reluctance to address this issue is doubtless explained by the fact that cases Kodak itself cited show that parts and service markets can and do exist as matters of fact and law, particularly in situations such as here where Kodak has a natural monopoly. *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 282 (5th Cir. 1978).

In *Spectrofuge*, defendant Beckman had a large share of the replacement parts market, but not even a natural monopoly therein: "[Plaintiff] Spectrofuge [an ISO] was

not dependent on Beckman for all parts; some – even major components – could be purchased from other sources." 575 F.2d at 271 (footnote omitted). Still, the court went on to analyze the existence of a service market and the conditions under which a relevant market should be limited to a single firm's products. The court first noted that:

> Since *du Pont* it has generally been recognized that every manufacturer has a "natural" monopoly in the sale and distribution of his own products, especially when they are sold under a trademark . . . Similarly, some courts in varying contexts have recognized that *a vertically integrated manufacturer* may initially have a "natural" monopoly over certain new products until other companies begin to compete with the manufacturer at one level of competitive activity.

575 F.2d at 282 (emphasis supplied).

Here, of course, Kodak has a "natural monopoly" over its own machines and parts sold under its trademark. Moreover, as a classic example of a vertically integrated manufacturer, Kodak currently continues to enjoy its natural monopoly over its parts because no others have yet begun to compete at that level. Under such circumstances, *Spectrofuge* teaches:

> Several cases indicate that it is possible under certain prescribed circumstances *to limit the relevant market to a single firm's products. E.g., Eastman Kodak v. Southern Photo Materials Co.*, 1927, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684; *Poster Exchange, Inc. v. National Screen Serv. Corp.*, 5 Cir., 1970, 431 F.2d 334, 339; *Bushie, supra, Tire Sales Corp. v. Cities Serv. Oil Co.*, N.D. Ill. 1976, 410 F.Supp. 1222, 1230. Analysis of these cases

> reveals that *such a limited market would be appropriate when*, for example, *the vertically integrated manufacturer uses his dominant position at one level of competitive activity to eliminate competition at another level. . . .*

575 F.2d at 282 (emphasis supplied).

Such analysis is directly applicable here. Kodak, as a vertically integrated manufacturer, using its dominant position in the sale of its parts, in a market properly limited to Kodak parts, to eliminate competition at another level, service, where new entrants had already begun to compete before Kodak cut them off.

Dimidowich v. Bell & Howell, 590 F.Supp. 45 (C.D. Cal. 1984), *tying claim withdrawn on appeal*, 803 F.2d 1473 (9th Cir. 1986), did *not* involve replacement parts policies "virtually identical" to Kodak's here, as Kodak represented below and as the district court may have believed. In *Dimidowich*, defendant Bell & Howell maintained "a policy of not selling repalcement parts for its equipment except through its own service organization, *or directly to owner-users*." 803 F.2d at 1475 (emphasis supplied). Bell & Howell did *not condition* its sale of parts to owner-users on the latters' agreement *not* to purchase service from ISOs, as does Kodak, or on the condition the equipment be purchased directly from Bell & Howell, as does Kodak. Rather, the district court in *Dimidowich* expressly found that *"Bell & Howell's condition* for the sale of replacement parts for its equipment is *only* that the replacement parts be used on Bell & Howell equipment owned by the purchaser." 590 F.Supp. at 49 (emphasis added).

Thus, in *Dimidowich*, a Bell & Howell owner *could* order a part, hand in part to its ISO, and have that ISO

install the part and service its equipment. *A Kodak equipment owner cannot, because Kodak will not sell parts to its owners – even those who buy equipment directly from Kodak – if that owner purchases service from an ISO.* The parts policies of Kodak and of Bell & Howell in *Dimidowich* are fundamentally different: Bell & Howell did not tie parts to any other product; Kodak ties parts to an agreement that the parts buyer *not purchase service from an ISO* or that it *also buys Kodak service.* Because Kodak is the only other servicer in town, Kodak's policy in the first case, of course, in reality ties Kodak service to Kodak parts.

Finally, this Court's discussion in *Dimidowich* to the effect that service can constitute a separate product market, and that such a market can be limited to service for a single brand of equipment, assists plaintiffs in their tying claim and must be considered by the district court upon remand. In connection with a conspiracy claim, this Court in *Dimidowich* noted that:

> [A]n owner of broken B & H micrographic equipment is indifferent to people who can service Kodak or 3M machines. *If the owner's only option is to request service from B & H* or Comgraphix (depending on his location), *that is obviously the market the owner faces.* B & H is entitled to prove that replacement parts for different brands of micrographic equipment are interchangeable and therefore that its policy has no anticompetitive effect. However, if that is the case, its replacement parts policy makes little sense. In any event, B & H is not entitled to summary judgment on the ground that there is no evidence of anticompetitive effect.

803 F.2d at 1481 n.3 (emphasis supplied).

Here too, a Kodak customer's "only option is to request service from" Kodak, or roll up his sleeves and try to fix his directly purchased equipment himself. *That is obviously the market the Kodak owner faces,* precisely as in *Dimidowich.* That is "obviously" the relevant market for the tied product, service, here. That is "obviously" the market in which Kodak restrains competition because of its tying arrangement. Plaintiffs here have not merely met the *Jefferson Parish* "more than *de minimis*" test of restraint on competition in the tied service market, they have shown Kodak's ability to choke off *all* competition in that market by refusing parts sales to ISO-serviced equipment owners, to owner-ISOs, and to brokered-equipment owners. On this record, in the words of *Dimidowich,* Kodak "is not entitled to summary judgment on the ground that there is no evidence of anticompetitive effect."

Kodak's motion for summary judgment as to plaintiffs' tying claim was improvidently granted, and the district court must be reversed.

II. KODAK'S CHANGE OF ITS LONG-STANDING POLICY TO SELL PARTS TO COMPETITORS "UNNECESSARILY EXCLUDES OR HANDICAPS THEM" AND IS ILLEGAL UNDER *ASPEN* AND SECTION 2 OF THE SHERMAN ACT.

A. *Aspen* Controls the Claims Under Section 2 of the Sherman Act.

The district court summarily dismissed plaintiffs' claims under Section 2 of the Sherman Act, and the

Supreme Court decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), without discussion of why *Aspen* does not apply. The district Court stated:

> Kodak has, of course, a natural monopoly over the market for parts it sells under its name but that imposes no duty on it to sell to plaintiffs. *See Olympia Equip. Leasing v. Western Union Telegraph*, 797 F. 2d 370, 375 (7th Cir. 1986) ("a firm with lawful monopoly power has no general duty to help its competitors.") *Compare Aspen Skiing Co. v. Aspen Highlands Skiing Corp., supra* (dominant seller monopolized market by terminating joint arrangement with competitor). Kodak's unilateral refusal to sell its parts to plaintiffs does not violate Section 2. *Bushie*, 460 F. 2d at 120.

(Excerpts, p. 71, ll. 1-10.)

The Supreme Court in *Aspen* recognized that a change by a monopolist of a long-standing policy which "unnecessarily excludes or handicaps competitors" violates Section 2 of the Sherman Act (15 U.S.C. § 2). The principles enunciated in the Supreme Court's unanimous decision in *Aspen* govern the present case.

In *Aspen* the defendant controlled three of four mountains and the ski lifts on them in Aspen, Colorado. He had a "natural monopoly" with respect to those mountains and lifts. The defendant had cooperated for several years with the plaintiff who controlled the fourth mountain and the lifts on it by jointly offering a multi-day "all Aspen" ski lift ticket. Skiers found the combination "all-Aspen" ticket so desirable that it consistently outsold all other offerings by defendant or plaintiff, including defendant's ticket which featured only its own

mountains. Beginning approximately in 1977, defendant began to take various actions that made it extremely difficult for plaintiff to compete, including refusal to continue to offer its mountains and lifts for the "all-Aspen" ticket. Plaintiffs market share declined steadily. Plaintiff sued, alleging that defendant had monopolized the Aspen downhill skiing market in violation of Section 2 of the Sherman Act. The jury found for plaintiff. The trial court entered judgment accordingly, and the Tenth Circuit Court of Appeals affirmed. A unanimous Supreme Court also affirmed, concluding:

> Thus the evidence supports an inference that [defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer good will in exchange for a perceived long-run impact on its smaller rival.

472 U.S. at 610-611.

In its opinion, the Supreme Court recognized that a firm with monopoly power *ordinarily* has no duty to cooperate with its competitors and may refuse to deal with them if that refusal is based on valid business reasons. 472 U.S. 596. Thus a monopolist may reject a novel offer to participate in a cooperative venture proposed by a competitor. 472 U.S. at 603.

The Court went on to hold, however, that a monopolist may not discontinue long-standing cooperative policies which are important to the character of a market in a deliberate effort to discourage customers from doing business with its smaller competitors. 472 U.S. at 604 and 610. Such "an important change in the character of the

market" (*Id.*) by a monopolist is subject to close scrutiny under the antitrust laws because:

> [i]n any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs.

Id., 472 U.S. at 604, n.31, *quoting* Judge Robert Bork, *The Anti-Trust Paradox* (1978), p. 156.

B. *Bushie* and *Calculators Hawaii* are Inapposite.

Since the case at bar: (1) deals with a "pattern of distribution" that is nationwide, and not merely the termination or substitution of a single distributor; and (2) it does not involve "interbrand" competition by different equipment manufacturers for new equipment purchases, Kodak's reliance, and the district court's citation of *Bushie v. Stenocord Corporation*, 460 F.2d 116 (9th Cir. 1972) (single dealer termination in the Phoenix, Arizona area, based on decision of manufacturer to institute exclusive direct sales and service), and of *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F. 2d 1332 (1983) (manufacturer adopts direct sales and service policy in Hawaii that was its usual practice nationwide) are totally inapposite.

In both *Bushie* and *Calculators Hawaii*, the Ninth Circuit was dealing with *sales of new equipment* as well as service for that equipment. With regard to sales of new

equipment, it is clear that interbrand competition forecloses a Section 2 monopolization claim for such sales. With regard to *service*, however, the Ninth Circuit in *Dimidowich* rejected Kodak's present claim that interbrand competition was relevant, stating:

> . . . an owner of broken B & H micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the owner's only option is to request service from B & H or Comgraphix . . . that is obviously the market the owner faces.

803 F.2d at 1480-1481 n.3.

Whether interbrand competition forecloses a Section 2 monopolization claim for *service* was also answered by *Dimidowich*, since in the above-quoted passage, the Ninth Circuit ruled out the option of an owner of broken equipment to sell or junk that equipment and avail himself of another brand – the "option" of interbrand competition on the machine level. At best, for Kodak, whether interbrand machine competition is a viable defense to monopolization of service is a disputed material fact. At worst, as a matter of law, an owner of a Kodak photocopy machine purchased for $75,000+ facing a $2,000 per year supracompetitive Kodak maintenance charge cannot practically consider selling his machine for under $5,000 to avail himself of some "interbrand" competitor.

While in the case of cheaper pieces of equipment like dictating machines (*Bushie*) or money-handling machines (*Calculators Hawaii*) the cost of the machine versus the cost of supracompetitive service may practically allow switching to an interbrand competitor, here (and in *Digidyne*) the investment in the equipment is substantial, the

losses in switching are substantial, and owners are "locked-in." As recognized by *Dimidowich*, "the owner's only option" is to request service from whomever services his brand of equipment. Kodak's life-or-death reliance on "interbrand competition"[4] and the district court's adoption of that argument is a red herring.

C. Olympia Equip. Leasing Co. Recognizes a Monopolist's Obligation Sell to a Competitor.

The district court was likewise incorrect in its reliance on the Seventh Circuit case of *Olympia Equip. Leasing Co. v. Western Union Telegraph*, 797 F.2d 370 (7th Cir. 1986). *Olympia* involved an alleged monopolist's undisputed efforts to relinquish its monopoly in the relevant market. This was found to be an unassailable justification for its discontinuance of prior policies. Western Union had a monopoly in telex service and had also provided its customers with telex terminal equipment. It decided to withdraw from the equipment market and sell off that equipment. It also provided its salesmen with a list of independent terminal equipment suppliers including Olympia. When its own equipment did not sell fast

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[4] *See, e.g.*, Plaintiff's Memorandum of Points and Authorities, "Denying the existence of interbrand equipment competition is thus critical to plaintiffs' case because without that foundation, Kodak admittedly has no power to leverage" and "fundamentally, the issue in this case is one of law whether an equipment manufacturer that lacks market power in the relevant equipment market may choose not to sell replacement parts to independent service firms." (Record, Docket No. 19, p. 7, ll. 23-25 and p. 21, ll. 13-17.)

enough, Western Union withdrew its sales force's assistance to Olympia. Olympia, which had no sales force, sued. The Seventh Circuit found Olympia could have hired its own sales force, and Western Union was not compelled to act as Olympia's sales agent. *Olympia* is thus distinguished on its basic facts.

Olympia, moreover, is distinguished expressly from cases like the one at bar, where the monopolist's acts injure a *competitor* who is also a *customer*. The court in *Olympia*, unlike the district court in this case, recognized that where there is a situation of a "monopoly supplier's discriminating against a customer because the customer has decided to compete with it," the case is an "essential facility" case like *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) and the monopolist may be guilty of monopolization if it refuses to allow the competitor access to the facility. The court in *Olympia* reasoned:

> Some cases hold, however, that a firm which controls a facility essential to its competitors may be guilty of monopolization if it refuses to allow them access to the facility. *We accept the authority of these cases absolutely.* They are well illustrated by *Otter Tail Power Co. v. United States*, . . . It might seem that if a monopolist's refusal to sell his products or services to a competitor can thus be actionable under antitrust law, it must mean that monopolists sometimes do have a duty to help their competitors and that the cases which deny this proposition are wrong. But the monopolistic-refusal-to-deal cases qualify rather than refute the no-duty-to-help-competitors cases. If a *competitor* is also a *customer* his relationship to the monopolist is not only a competitive one. *The monopoly supplier who retaliates against customers who have the*

> *temerity to compete with him, by cutting such customers off, is severing a collateral relationship in order to discourage competition.*
>
> The present case *would be an essential facility case* if Western Union had refused to supply telex service to a customer who got his terminal equipment from Olympia [a competitor] rather than from it, . . .

(*Id.* at 376, emphasis supplied).

The analogy is clear. Kodak is refusing to supply parts to ISOs because the ISOs have had the "temerity to compete" with it. Kodak also has refused to supply parts to anyone who purchases service from a competing ISO and not from Kodak, or who purchases his equipment from a competing broker. This case is more that a no-duty-to-help-competitors case. *This* is an "essential facility" case, and Kodak can be shown at trial to be guilty of monopolization for its monopolistic-refusal-to-deal.

Insofar as the district court read *Olympia* to advocate that monoplists are free to compete just like any other business, it was simply wrong. Judge Learned Hand rejected that view over forty years ago in his landmark opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), and limited the actions of a monopolist. The Supreme Court further defined those limitations in *Aspen*.

D. The Ninth Circuit Has Also Recognized A Monopolist's Obligations to Sell to A Competitor

The Ninth Circuit has, as well, set out the limitations on a monopolist's refusal to deal recently in *Oahu Gas*

Service, Inc. v. Pacific Resources, Inc., 838 F. 2d 360 (9th Cir. 1988). This Court stated in *Oahu*:

> We therefore reject [defendant] Pacific Resources' broad contention that the antitrust laws may never impose duties on a monopolist to aid its competitors. Because of a monopolist's special position the antitrust laws impose what may be characterized as affirmative duties [citing *Aspen* where the "monopoly power was required to continue a marketing arrangement with its small neighbor" when the monopolist had no legitimate business justification for refusal to deal, and dealing with his competitor "increased competition and benefited consumers"]. These duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor.
>
> Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct.

(*Id.* at 368.)

In *Oahu*, this Court eventually found that Pacific Resources was not obliged to *expand* its refinery *to provide* for production of propane that it *did not produce* at the time, propane that could be purchased by Pacific Resources' competitor Oahu. Pacific Resources' decision, based on the fact that expansion would be *unprofitable*, was found not to violate Section 2. The facts of *Oahu* clearly distinguish it from the case at bar.

In a case more on point, *Pacific Coast Agricultural Export Ass'n. v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976), this Court

found a Section 2 violation where Sunkist, with monopoly power over the supply oranges, refused to sell oranges to a competitor who exported oranges. Just as Kodak in this case has used its control over the wholesale supply of parts to control retail service of Kodak machines, Sunkist had cut-off plaintiff's already-existing supply of oranges in order to eliminate its competitor at the retail level. This Court found that "Sunkist's control of supply was employed to extend is monopoly illegally into distribution." *Id.* at 1204.

E. The Standard To Be Applied.

Taking the holdings in *Aspen*, *Pacific Coast Agricultural Export Ass'n.* and *Oahu*, the pertinent legal inquiry in the present case, as to violation of Section 2 of the Sherman Act, is: Was Kodak's radical change in parts policy in refusing to sell parts to its ISO *customers* an unnecessary exclusion and handicapping of its *competitors* in another area, that of service, or was it primarily motivated by a valid business justification? If it was the former, it was illegal and predatory. If it was the latter, it was lawful. Both present material issues of fact, and, neither is properly decided by summary judgment.

Plaintiffs submitted substantial evidence which supports a finding, or which at least raises a triable material issue of fact, as to whether Kodak's actions in cutting off parts were unnecessarily exclusionary and predatory or were justified by legitimate business interests. (*See* Statement of Facts III.E. and III.F., *supra.*) Kodak itself has, by implication, listed elimination of plaintiff ISOs as a reason for its policies. (See record, Docket No. 19, pp. 17,

l. 3-18 l. 2, eliminating "free-riders," and pp. 14, ll. 14-15, l. 6, preventing ISOs from doing Kodak service and "dividing responsibility for product reliability.") Kodak's other proferred reason, to reduce inventories and increase profits on parts, likewise failed. Kodak had always stocked its parts to supply parts for its entire population of Kodak equipment. It will continue to do so under its new policy. Parts sold in the past to ISOs were sold at great profit to Kodak. Kodak was willing to sell parts to anyone else but ISOs – its competitors. (*See* Statement of Facts III.E., *supra.*)

Kodak's own statements and its timing of the parts cutoff, both to individual ISOs like ITS and Top Copy/Legal Copy, and as to the market generally (as the ISOs began to erode its market share), do not show simple business-justified motives, but the motives a predatory competitor. Kodak, in the words of *Olympia* "retaliat[ed] against customers who had the temerity to compete with [it], by cutting such customers off." They were, plainly and simply, "severing a collateral relationship in order to discourage competition."

Kodak's actions are illegal under Section 2 of the Sherman Act, and plaintiffs have raised triable issues of material fact as to such illegality.

CONCLUSION: RELIEF SOUGHT

The district court's judgment against plaintiffs should be reversed as to both the tying claims under Section 1 of the Sherman Act, and the monopolization claims under Section 2 of the Sherman Act. There should

be a finding that plaintiffs have raised triable issues of material fact as to:

1. Whether relevant markets for parts and service of Kodak equipment exist;

2. Whether Kodak has market power in the parts market;

3. Whether Kodak's tying arrangements constitute *per se* violations of Section 1 of the Sherman Act or unreasonably restrain competition in the service market; and

4. Whether Kodak monopolized the service market by changing its longstanding parts policies as an unnecessary and deliberate effort to exclude competitors.

STATEMENT OF RELATED CASES

Plaintiffs are aware of no other cases in this Court that are related to this case within the meaning of Ninth Circuit Rule 28-2.6.

Dated: October 10, 1988

Respectfully submitted,

By: /s/ James A. Hennefer
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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 88-2686

IMAGE TECHNICAL SERVICES, INC., et al.,
Plaintiffs-Appellants,
v.
EASTMAN KODAK COMPANY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. C-87-1686-WWS

Honorable William W. Schwarzer
Judge Presiding

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Defendant-Appellee.

CERTIFICATE AS TO INTERESTED PARTIES

Pursuant to Ninth Circuit Rule 28-2.1, counsel for appellee Eastman Kodak Company certifies that there are no known interested parties other than the parties participating is this case.

These representations are made to enable judges of the Court to evaluate possible recusal.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 88-2686

IMAGE TECHNICAL SERVICES, INC., et al.,
Plaintiffs-Appellants
v.
EASTMAN KODAK COMPANY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA
Case No. C-87-1686-WWS

Honorable William W Schwarzer
Judge Presiding

BRIEF OF APPELLEE

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INTRODUCTION

On three occasions in the past sixteen years, the Ninth Circuit has ruled that a manufacturer, who lacks market power and acts unilaterally, may decline to sell to anyone replacement parts for its own branded products without violating the Sherman Act. *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (9th Cir. 1983); *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972). No Ninth Circuit case has ever held to the contrary. In fact, other circuit and district courts addressing the issue have upheld this practice against antitrust challenge. *See e.g., Spectrofuge Corp. v. Beckman Industries, Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Nobel Scientific Industries, Inc. v. Beckman Industries, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 67,809 (4th Cir. 1987), *aff'g and adopting*, 670 F. Supp. 1313 (D. Md. 1986).

Appellants' position, at bottom, would require this Court to overturn all of these decisions. Appellants would compel Kodak, one of many firms in the fiercely competitive copier and micrographics industries, to support "freeriding" by appellants. They would force Kodak to promote competition against itself by providing appellants and other "Independent Service Organizations" ("ISOs") with replacement parts they would use to compete *only* against Kodak. To support this claim, they try to twist an undisputed set of facts into numerous types of Sherman Act violations. However, as the District Court recognized, there is but one fundamental issue in this case: do the antitrust laws impose a duty on a manufacturer who lacks market power to sell replacement parts to

ISOs so that they may compete more easily against the manufacturer's own service organization?

The antitrust laws impose no such duty, and because they do not the District Court was correct in granting Kodak summary judgment.

I. QUESTION PRESENTED

Kodak manufactures and markets copiers and micrographics equipment. It competes against many firms and concededly lacks market power. Kodak also makes or procures replacement parts for its products and uses such parts in providing maintenance and repair service to its customers. Kodak does not knowingly sell replacement parts for its copiers nor for many of its micrographics products to ISOs like appellants. Did the District Court correctly grant summary judgment on appellants' claims that Kodak violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, where there was no genuine issue of material fact that (a) Kodak adopted that policy unilaterally, (b) the policy did not unreasonably restrain trade or threaten monopoly in any relevant market, and (c) that Kodak had valid, pro-competitive business reasons for its policy?

II. STATEMENT OF THE CASE

A. Jurisdiction and Timeliness.

Kodak agrees with appellants' statements concerning jurisdiction and timeliness.

B. Proceedings Below.

Plaintiffs filed their 47-page complaint in April 1987. (Record, No. 1) They alleged 16 "Claims for Relief." Four are brought pursuant to the federal antitrust laws. The remaining twelve claims are brought pursuant to various state unfair competition statutes or under the common law of unfair competition. The antitrust claims include several allegations of conspiracy, several tying arrangements, and several theories of monopolization. However, the gravamen of all claims is that Kodak has a duty to sell plaintiffs replacement parts so they may compete more easily against Kodak in the provision of repair and maintenance service on Kodak equipment.

Kodak denied all the allegations of wrongdoing contained in the complaint and asserted various affirmative defenses. (Record, No. 3) For several months the plaintiffs took no action to advance the case. In August 1987, Kodak filed its motion for summary judgment. (Record, No. 11) Kodak explained that it had filed the motion before plaintiffs had initiated discovery because the key fact — Kodak's unwillingness to sell parts to ISOs like the plaintiffs — was not disputed. (Record, No. 19, p. 2) That was Kodak's policy, and the question was whether the antitrust laws forbade it.

Kodak did not, however, oppose plaintiffs' subsequent request for discovery. At a status conference held on September 11, 1987, Kodak agreed that plaintiffs were entitled to discovery limited to the issues material to Kodak's motion, and in fact plaintiffs were given and took the opportunity to propound interrogatories, obtain documents and take depositions. (Record, No. 27, Order

of Sept. 18, 1987) On December 21, 1987, the District Court held another status conference during which it heard, and granted in part, plaintiffs' request for additional discovery. The court's order also provided that plaintiffs should respond to Kodak's motion on January 29, 1988 — five months after it was filed — and that plaintiffs could, if they wanted, request still further discovery in their brief pursuant to F.R.Civ.P. 56(f). (Record, No. 36, Order of Jan. 4, 1988.)

Plaintiffs advanced fewer theories in their opposition papers than had been in the complaint, and fewer still were supported by any evidence. The theories most seriously advanced were: (a) that Kodak had used its parts policy to monopolize relevant markets defined as the service of Kodak micrographics equipment and copiers; (b) that Kodak had engaged in unlawful tying by using its control over parts to force customers to buy Kodak equipment and Kodak service; and (c) that Kodak had convinced its own parts suppliers not to sell parts to plaintiffs.

By Memorandum of Opinion and Order dated April 15, 1988, the District Court granted Kodak's motion and dismissed the complaint. (Record, No. 49, Order of April 18, 1988) Plaintiffs' Section 1 claims were dismissed because the court found that plaintiffs had failed completely to support their conspiracy allegations with any evidence. In particular, the court found that the only evidence of the alleged agreements between Kodak and its parts suppliers was inadmissible hearsay, and that such an agreement, if it in fact existed, would not have violated Section 1 anyway. (*Id.* at 4) The court also found

that plaintiffs had failed to raise a genuine issue regarding the existence of any unlawful tying arrangements. No evidence had been presented by plaintiffs that Kodak had conditioned parts sales on a customer's agreement to purchase either additional equipment or Kodak service. (*Id.* at 4-5) Finally, the court dismissed plaintiffs' Section 2 claims because Kodak concededly lacked market power in the relevant interbrand equipment markets and because any "natural monopoly" which Kodak had over its own branded parts did not impose on it a duty to help its competitors. (*Id.* at 7-8) Judgment for Kodak was entered on April 19, 1987. (Record, No. 50)

III. STATEMENT OF FACTS

Plaintiffs have attempted to create the impression that there are disputed factual issues by presenting a lengthy and complicated statement of facts. The *material* facts are simple, however, and they are not genuinely disputed.

A. The Parties and the Market Setting.

The eighteen plaintiffs are engaged in the business of repairing and servicing Kodak copiers and micrographics equipment. (Record, No. 1, Complaint ¶ 21) Generally they do not manufacture the replacement parts which they use to service that equipment. Rather, they claim a right to purchase parts, which they broadly define to include tools, test equipment, supplies, and service manuals, from the only company which they identify as their competitor, Kodak. (*Id.*, ¶ 22)

Kodak's Copy Products Division manufactures, markets and services a line of copier-duplicators sold under the trademark "Ektaprint." (Record, No. 14, Murray Decl. ¶ 1) Kodak's Business Imaging Systems Division ("BISD") manufacturers, markets and services business micrographics equipment, principally microfilmers, reader-printers, and other microfilm retrieval systems. (Record, No. 15, Lacy Decl. ¶ 3)

Kodak's Ektaprint copiers perform the same photocopy function as and compete directly with copiers manufactured by a long list of major firms, including Xerox, the industry giant, and Japanese firms such as Savin, Canon, Ricoh and Minolta. Plaintiffs concede that Kodak does not have any market power in the copier market. (Appellants' Opening Brief ("A.O.B."), pp. 44-45)

Plaintiffs also concede that Kodak has no market power in any micrographics equipment market. (*Id.*) Kodak faces strong competition from micrographics equipment makers such as Canon, Minolta, 3M and Bell & Howell. Kodak's share of U.S. sales of business micrographics equipment is less than 20 percent. (Record, No. 15, Lacy Decl. ¶ 6) Moreover, customers have alternatives other than microfilm — such as hard copies or computer storage — to manage information in image form. (*Id.*, ¶¶ 5, 14-15) Thus, any attempt by any micrographics equipment maker to exercise market power would fail.

At the present time, Kodak and its parts suppliers are the only firms which manufacture replacement parts for Kodak's copiers and micrographics products. (Record, No. 1, ¶ 23) Plaintiffs offered no evidence suggesting that

they were incapable of making such parts, as independent firms, for example, have manufactured parts for different makes of computers. Plaintiffs simply prefer that Kodak act as their parts supplier. Of course, by obtaining those parts, plaintiffs compete only against Kodak.

B. Kodak's Parts Policies

Kodak's Copy Products Division and BISD have slightly different parts policies. They are described separately.

1. The Copy Products Parts Policy

Ever since Kodak entered the copier business in 1975, the business practice of its Copy Products Division has been to sell parts for its copiers only to direct copier customers. Kodak does not knowingly sell parts to ISOs or other persons engaged in servicing Kodak copiers owned by others, or to persons who wish to service Kodak copiers they have purchased from sources other than Kodak. (Record, No. 14, Murray Decl. ¶ 23) Kodak has never knowingly sold copier parts to anyone who would use those parts to service someone else's Kodak copier. (*Id.*)

2. The BISD Parts Policy.

The BISD parts policy is somewhat different. The relevant business practice was adopted by Kodak in April 1985, and distinguishes between "new products" and

"older products" as of that date Historically, Kodak sold micrographic equipment parts to anyone, including plaintiffs. When Kodak changed its policy in 1985. it "grandfathered" older product parts. Kodak continues to sell such parts to anyone, including plaintiffs. (Record, No. 15, Lacy Decl. ¶ 22; No. 12, Lorensen Decl. ¶ 4) However, if there is a shortage of a part, orders from ISOs are filled only after the needs of Kodak and its direct equipment customers have been met. (Record, No. 12, Lorensen Decl. ¶ 6) In addition, certain "all time" parts — parts as to which Kodak has placed a final order with its supplier intended to last for the life of the equipment and which cannot be ordered again — are often saved for Kodak's customers and are not sold to ISOs. (Id., ¶ 10) With respect to newer product parts (beginning with the KODAK RELIANT Intelligent Microfilmer 1000), BISD adopted the Copy Products parts policy: parts for new products are made available only to direct equipment customers. (Record, No. 15, Lacy Decl. ¶ 22)

C. The Business Reasons For Kodak's Parts Policies.

As the undisputed evidence below demonstrated, there are three main reasons for the parts policies: (1) to promote interbrand equipment competition by allowing Kodak to stress its renowned service commitment; (2) to reduce Kodak's inventory costs by not stocking parts for ISOs; and (3) to prevent ISOs from freeriding on Kodak's investment in copier and micrographics equipments, parts, and service.

1. Promoting Interbrand Competition

Kodak's primary business is selling equipment, *i.e.*, copiers and micrographics equipment. Kodak also sells parts and service, but as an adjunct to equipment sales. Service keeps the equipment running and the customer satisfied. Good service enhances Kodak's ability to sell equipment. (Record, No. 14, Murray Decl. ¶ 13; No. 15, Lacy Decl. ¶¶ 11, 12)

It is undisputed that in marketing their products, both the Copy Products Division and BISD stress Kodak's commitment to outstanding service. Kodak's commitment to service is evidenced by the fact that surveys among both the copier and micrographics equipment users consistently rate Kodak service number one in customer satisfaction. Kodak heavily advertises that fact in marketing its copiers and micrographics equipment against its competitors. (Record, No. 14, Murray Decl. ¶ 19; No. 15, Lacy Decl. ¶ 20)

It is also undisputed that a manufacturer's commitment to service is a key factor in a customer's decision to choose one brand of equipment over another. Good factory service, therefore, is an inextricable part of a manufacturer's equipment product offering. This is also evidenced by Kodak's advertising. One Kodak campaign touts "The Kodak Advantage" — "leading technology, proven reliability and the best service in the business." (Record, No. 14, Murray Decl. ¶ 22 & Ex. 4)

The relationship of service to the underlying equipment offering was central to Kodak's decisions to adopt the challenged parts policies. The main reason that Kodak

adopted the copier parts policy when it started selling copiers in 1975 was to bolster its emphasis on quality service; that was a key part of its basic business strategy for marketing its copiers. (*Id.*, Murray Decl. ¶ 26) The same consideration influenced BISD's decision to adopt a modified parts policy in April 1985. (Record, No. 15, Lacy Decl. ¶ 25)

The parts policies have also been maintained because Kodak believes that dividing responsibility for product reliability between itself and an ISO damages Kodak's relationship with its equipment customers. This happens in two ways. First, when an ISO has displaced Kodak service with respect to a particular customer, Kodak loses the day to day contact with the customer that is crucial to keeping the customer satisfied and learning of potential new sales opportunities. (Record, No. 15, Lacy Decl. ¶ 27; No. 14, Murray Decl. ¶ 28) But even more important, divided responsibility inevitably leads to "finger-pointing" whenever an ISO is unable to repair a problem. Wanting to deflect the blame away from themselves, ISOs tend to blame Kodak for the problem, even if it is the result of improper diagnosis, maintenance or repair. (Record, No. 14, Murray Decl. ¶ 30; No. 15, Lacy Decl. ¶ 27) Kodak has no opportunity to respond; it may never even hear of the problem. But the customer's image of Kodak is tarnished and that hurts Kodak when the customer has future equipment needs. Kodak does not want to encourage even the possibility of that happening by fostering the efforts of ISOs.

Thus, Kodak's parts policies promote competition by increasing Kodak's competitiveness against its many domestic and Japanese equipment competitors.

2. Reducing Inventories

A second reason for the parts policies is to reduce Kodak's parts inventories and thereby reduce Kodak's costs. This was the main reason that Kodak changed its policy with respect to viewer micrographic parts. (Record, No. 15, Lacy Decl. ¶ 29; No. 13, Gross Decl. ¶ 6) In early 1985, Kodak had over $16 million of micrographic equipment parts in stock. (Record, No. 13, Gross Decl. ¶ 6) As a company-wide effort to improve its asset management, Kodak began looking for ways to reduce its parts inventory. One way was to stop making, buying and stocking parts for the benefit of ISOs. Kodak management felt it made no sense to subsidize the efforts of these firms by manufacturing or purchasing and, at Kodak's expense, maintaining inventories of parts for their use. (Record, No. 13, Gross Decl. ¶ 6; No. 15, Lacy Decl. ¶ 29) Thus it was decided not to sell parts for newer products to entities other than direct equipment customers. That way Kodak did not have to make, buy, or inventory additional parts.

3. Not Supporting Freeriding

A third reason for the parts policies is that Kodak does not want to help the ISOs take away service revenues from Kodak.

ISOs are what economists call freeriders. Unlike Kodak, which has invested hundreds of millions of dollars in its copier and micrographics equipment businesses, the ISOs have invested virtually nothing. (Record, No. 15, Lacy Decl. ¶ 28; No. 14, Murray Decl. ¶ 31) They

refuse to make their own parts or obtain them from other sources.

The reason ISOs target service revenues is obvious. If they can get parts from Kodak, ISOs can offer some level of service on a virtual shoestring. Their market is made for them by Kodak at Kodak's expense. And they can underprice Kodak because ISOs do not need to recapture the huge investment Kodak made in the business.

Kodak does not feel obligated to promote the activities of freeriders like plaintiffs, whose sole business is targeting revenues which otherwise would have been earned by Kodak. Because it must compete against the likes of Xerox, 3M, Bell and Howell and the ever increasing number of Japanese firms, it is challenge enough for Kodak to make an adequate return on its investments in these industries. (Record, No. 14, Murray Decl. ¶ 32) As freeriders, plaintiffs seek to force Kodak to assist them in their efforts to take away Kodak's service revenues, an important part of the total return on those investments. Accordingly, quite apart from all of the other reasons motivating the parts policy, Kodak has declined to sell parts to the ISOs because it does not want to help them take away revenues from Kodak. If the ISOs want to compete against Kodak, Kodak believes that they, like Xerox and 3M and Kodak's Japanese competitors, should develop the needed resources at their own risk and expense.

D. The Implementation of Kodak's Parts Policies

Plaintiffs try to make something of Kodak's efforts to enforce its parts policies, claiming that these efforts

evidence anticompetitive intent. (*See, e.g.*, A.O.B. at 11-14) Those "facts" add nothing. Kodak readily admits it has done as well as it could to enforce its policies and prevent ISOs' from surreptitiously buying parts from Kodak contrary to Kodak's policies. To do that Kodak obviously had to identify customers ineligible to buy certain parts; hence the efforts to identify "BENUs" ("Business Equipment Non-Users") about which plaintiffs complain. Kodak also had to counteract the various forms of subterfuge, *e.g.*, ordering parts under assumed names, that ISOs use to circumvent the parts policies. (*Id.* at 12) Admittedly, Kodak has been far less than 100% successful in enforcing its policies, and as a result many of the plaintiffs and other ISOs have been able to acquire parts from time to time or even regularly.

All of this, however, is beside the point. Any failures by Kodak to enforce the policy simply benefit plaintiffs and other ISOs. They surely do not give them more reason to complain than if Kodak succeeded in enforcing its policies with 100% effectiveness.

STANDARD OF REVIEW

Review of a grant of summary judgment is *de novo*. *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987). Summary judgment is properly granted where the moving party shows that there is no genuine issue of material fact. "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Id.*

This Court has recently recognized that developments in the law have "increased the utility of summary

judgment." *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 698 (1988).

> "First, . . . if the non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine issue of fact with respect to the existence of that element, then summary judgment is appropriate. [cite omitted] Second, to withstand a motion for summary judgment, the non-moving party must show that there are 'genuine factual issues that can be resolved only by a finder of fact *because they may reasonably be resolved in favor of either party.*' [cite omitted] Finally, if the factual context makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial."

Id. (emphasis by Court). Plaintiffs' challenge to Kodak's parts policies raises no genuine issues of material fact.

ARGUMENT

I. THE ANTITRUST LAWS DO NOT REQUIRE KODAK TO SELL PARTS TO APPELLANTS.

Plaintiffs advance two theories on appeal: (1) that Kodak's unilateral decision not to sell parts to ISOs constitutes an unlawful tying arrangement, and (2) that *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (*"Aspen"*), obligates Kodak to sell parts to competitors. Both arguments will be addressed fully. However, as the Ninth Circuit has already decided the

fundamental issue in this case on three occasions, it makes sense to start with those cases.

A. The Basic Rule Of *Bushie, Calculators Hawaii* and *Dimidowich*.

Nearly seventy years ago, the Supreme Court ruled in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), that the Sherman Act "does not restrict the long-recognized right of trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal." The Ninth Circuit has applied the *Colgate* doctrine to rule on three separate occasions that a manufacturer's unilateral refusal to sell replacement parts does not violate the antitrust laws. *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (9th Cir. 1983); *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987).

In *Bushie*, the plaintiff sold and serviced Stenocord dictating machines, under a distributorship agreement. Later, Stenocord elected to proceed exclusively with its own sales and service operation, and terminated Bushie's distributorship. Bushie claimed, *inter alia*, that he wished to continue selling and servicing Stenocord machines after his distributorship was terminated, but was unable to obtain the equipment and parts he needed to do so. He sued Stenocord and contended that by refusing to sell him equipment and parts Stenocord was trying to monopolize markets for the sale and servicing of Stenocord dictating machines. 460 F.2d at 118 n.1. In other words, plaintiff advanced the same basic claims of this

case. The Ninth Circuit affirmed a summary judgment for Stenocord, rejecting the plaintiff's arguments under both Section 1 and 2.

The key insight of *Bushie* is that if a manufacturer is faced with active interbrand equipment competition, it cannot restrain trade in or monopolize a "market" defined solely in terms of the sale or servicing of its own branded equipment. The Court recognized that, in a rough sense, every manufacturer "has a 'natural monopoly over his own products.' " *Id.* at 120, *quotinq Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1344 (9th Cir. 1970). However, "[u]nless the manufacturer used his natural monopoly to gain control of the *relevant* market *in which his products compete*, the antitrust laws are not violated." *Id.* Thus, only if the plaintiff can establish an interbrand monopoly, in the court's words "total market dominance -- as distinguished from 'brand' monopoly," will a viable antitrust action lie. *Id.* Of course, plaintiffs here do not even claim that Kodak has interbrand market power. (A.O.B., pp. 44-45)

The same result was reached, although for different reasons, in *Calculators Hawaii*. Again, the issue was a manufacturer's refusal to sell replacement parts for its products. The defendant, Brandt, Inc., manufactured money-handling machines. For some years it marketed its products in Hawaii through a distributor which had contracted with the plaintiff, Calculators Hawaii, to service and repair Brandt's products. In this role, Calculators Hawaii purchased repair parts from Brandt. 724 F.2d at 1336.

In 1976 Brandt altered its distribution system by replacing its distributor with a sales agent. The agent was given the exclusive right to both sell and service Brandt's products in Hawaii, and, accordingly, Brandt thereafter refused to sell replacement parts to Calculators Hawaii. *Id.* Calculators Hawaii brought an antitrust action, and in a bench trial prevailed on its claim that the refusal to sell parts restrained trade in and monopolized a market for "Brandt parts." *Id.* at 1337-39.

The Ninth Circuit reversed, finding that Brandt's parts policy did not restrict competition, did not evidence an intent to monopolize, and was not predatory. *Id.* at 1338 (re Section 1 claims) & 1339 (re Section 2). The court analogized the parts policy to an exclusive dealing arrangement. Such an arrangement, by definition, contemplates refusals to deal with others, and as a consequence those others lose business. But, the court held, that "is simply insufficient" to prove either anticompetitive effect or intent. *Id.* at 1337.[1]Indeed, the court held that in the absence of proof of harm to competition -- an

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[1] In fact, exclusive dealing arrangements are subject to antitrust scrutiny *only* for their potential effects on interbrand equipment competition. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) ("Exclusive-dealing arrangements may, in some circumstances, create or extend market power of a supplier . . . and may thus restrain horizontal competition"). They are presumed not to harm competition when "other and equivalent brands of [the relevant product] are readily available in the market." *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 376 (1967), *overruled on other grounds in Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

"absolutely essential" element of the case — the manufacturer did not even need to advance valid business reasons for its policy in order to prevail. *Id.* at 1338.[2]

Finally, in *Dimidowich* the Ninth Circuit considered a parts policy that was nearly identical to Kodak's — the policy maintained by Kodak's competitor in the micrographics business, Bell & Howell ("B & H"). B & H's policy, like Kodak's, is to sell replacement parts for its micrographic equipment only through its own service organization or directly to owner-users. 803 F.2d at 1475. It will not sell parts for use by ISOs. *Id.* Dimidowich, an ISO like the plaintiffs here, challenged that policy as an anticompetitive refusal to deal, as a tying arrangement, and as the product of an illegal conspiracy. The District Court held that B & H was entitled to summary judgment under *Bushie*, reasoning that even if the policy "has the natural tendency to monopolize the servicing of B & H equipment," it does not monopolize a *relevant* market, *i.e.*, the market "in which [B & H's] products compete." 590 F. Supp. at 49-50. The District Court also found that B & H's

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[2] Plaintiffs argue that *Bushie* and *Calculators Hawaii* do not apply, first, because this case is national in scope, and second, because they do not sell equipment. (A.O.B., p. 44) Those arguments go nowhere. The first argument is simply specious — that several farflung plaintiffs have decided to join together in a "national" lawsuit does not in any way affect Kodak's obligations under the antitrust laws. Plaintiffs' second argument is a mere smokescreen. The reality of interbrand equipment competition cannot be ignored simply because plaintiffs claim to offer only service. The tail does not wag the dog. Kodak has no obligation to support freeriding competitors, as this Court recognized in *Bushie, Calculators Hawaii*, and *Dimidowich*. Plaintiffs cannot escape the rule by ignoring the basis for it.

policy was not a tying arrangement and not the product of a conspiracy. *Id.*

The Ninth Circuit affirmed with respect to all the unilateral conduct claims. 803 F.2d at 1478. Regarding Dimidowich's refusal to deal claim, the Court observed that "[a] manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws." *Id.* Moreover, with respect to the conspiracy claim, the Court reaffirmed *Bushie* and *Calculators Hawaii* by holding that even where the refusal to deal is the product of a vertical conspiracy, "[t]he defendant's assertion of legitimate business justifications for its behavior . . . will generally result in summary judgment." *Id.* at 1484.[3]

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[3] The *Dimidowich* court reversed summary judgment regarding a "hybrid conspiracy" claim. That decision is of no moment here. B & H had allegedly conspired with its only distributor, Comgraphix, to foreclose plaintiff from obtaining parts. Comgraphix also competed with B & H, which concerned the Court since horizontal group boycotts are in some cases per se illegal. Because B & H and Comgraphix were both competitors and supplier/distributor, the Court held that Comgraphix had a peculiar "hybrid" relationship — they were both horizontal competitors and vertical supplier/ distributors. That very nearly made the alleged agreement between them *per se* illegal. *Id.* at 1484 ("[i]n the absence of a vertical component," agreement if proved would have been *per se* illegal). Kodak has no distributors whatever (Record, No. 14, Murray Decl. ¶ 24; No. 15, Lacy Decl. ¶ 3), and plaintiffs have dropped their "hybrid" conspiracy theory. Accordingly, this portion of *Dimidowich* is irrelevant to this case.

These decisions establish a clear and sensible rule of law. A firm facing interbrand equipment competition cannot monopolize — at least not in any anticompetitive sense — aftermarkets defined solely in terms of parts and service for its own brand equipment. Whether or not these are separate markets, they are at least related to the equipment market since, by hypothesis, all of the consumers in any "Kodak parts or service markets" are also Kodak *equipment* customers. As such, every customer in those "markets" has the ability to choose other equipment vendors (and their parts and service offerings) if Kodak tries to charge supracompetitive parts and service prices. Kodak knows this, and the undisputed evidence is that Kodak deliberately prices its service contracts to be competitive with its equipment competitors. (Record, No. 14, Murray Decl ¶ 11; No. 15, Lacy Decl. ¶ 9) In this way, interbrand equipment competition prevents Kodak or any similarly situated manufacturer from restraining competition or exerting market power in any aftermarket, including any hypothetical parts or service markets.

The Fourth Circuit recently relied on this analysis in ruling that refusals to sell parts or supplies to competitors do not violate the Sherman Act. *Nobel Scientific Industries, Inc. v. Beckman Industries, Inc.*, 831 F.2d 537 (4th Cir. 1987), *aff'g and adopting*, 670 F. Supp. 1313 (D. Md. 1986), *cert. denied*, 108 S. Ct. 2886 (1988). There, defendant Beckman was charged with monopolizing an alleged market for Beckman brand reagents, chemicals used in Beckman brand blood analyzers to detect particular substances in the blood. The court granted summary judgment for the defendant because it was indisputable that Beckman

blood analyzers faced competition from other manufacturers. Hence, "if the overall cost of operating an analyzer, whether due to reagent cost, service costs or otherwise, is too high, then a hospital or lab will switch to purchase of another company's equipment." 670 F. Supp at 1321. This prevented any possible anticompetitive effect in any reagent market. *See also, Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 282 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *MLC, Inc. v. North American Philips Corp.*, 1983-1 Trade Cases (CCH) ¶ 65,351, p. 70,093 (S.D.N.Y. 1983).

Thus, there is unbroken precedent and sound reason supporting the District Court's grant of summary judgment. There is no reason to depart from those precedents.

B. Kodak's Policies Are Proper As a Matter of Law Because They Promote Interbrand Competition.

The District Court's ruling, and Kodak's policies, are supported by basic antitrust policy. As the Second Circuit stated in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), "[s]o long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity. . . . These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power."

Kodak participates, and must remain competitive, in numerous interbrand equipment markets, including the markets for copy products and micrographics equipment. Interbrand competition in those equipment markets is

fierce, a fact that plaintiffs do not address, let alone dispute. Kodak, however, does not have the luxury of ignoring that competition. The policies that plaintiffs challenge are designed to make Kodak more competitive in the markets that matter to it — the interbrand markets for equipment.

Kodak has the right to take steps necessary to remain efficient. The fact that Kodak has developed a sufficiently popular product line to spawn a coterie of free riders does not obligate Kodak to support them for all time. *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 744 (9th Cir. 1979) ("IBM, assuminq it was a monopolist, had the right to redesign its products to make them more attractive to buyers . . . It was under no duty to help CalComp or other peripheral equipment manufacturers survive or expand.") Kodak's past success in the interbrand markets does not create special duties to support those, such as plaintiffs, who hinder its ability to remain competitive. "[A] defendant, having succeeded in legitimately controlling 'the best, most efficient and cheapest source of supply . . . ,' does not have to share 'the fruits of its superior acumen and industry.' " *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 979 (9th Cir. 1983).

Kodak's policies are reasonable efforts to retain its competitive position in the interbrand equipment markets. As the Supreme Court recognized in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977) ("*Sylvania*"), "[s]ervice and repair are vital for many products, . . . The availability and quality of such services affect a manufacturer's goodwill and the competitiveness

of his product." 433 U.S. at 55. Kodak has made a substantial investment in product development and training, and service revenue is a part of the anticipated return on that investment. Plaintiffs are free to compete with Kodak, but Kodak does not have to support their efforts to take away the fruits of its investment. The District Court's ruling recognized that principle and is fully supported by the law of this Circuit.

II. KODAK CANNOT BE FORCED TO SELL PARTS TO ISOs UNDER APPELLANTS' TYING AND ASPEN ARGUMENTS

A. Kodak's Parts Policy is Not an Unlawful Tying Arrangement.

Plaintiffs' principal argument on appeal is that Kodak's unilateral decision not to sell parts to ISOs constitutes an unlawful tying arrangement. On its face that makes no sense. A tying arrangement exists when the sale of one product (the "tying product") is conditioned on the buyer's willingness to simultaneously purchase another product (the "tied product"). *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) ("*Hyde*") If one refuses to sell a product under any conditions, as Kodak refuses to sell parts to ISOs, that is a unilateral refusal to deal, not a tying arrangement. As discussed above, unilateral refusals to deal do not violate the antitrust laws when undertaken by firms which, like Kodak, have no market power.

In both *Dimidowich* and *Nobel*, the courts concluded that refusals to sell replacement parts do not constitute tying arrangements. *Dimidowich*, 590 F. Supp. at 49, *aff'd*,

803 F.2d at 1478; *Nobel*, 670 F. Supp at 1328, *aff'd*, 831 F.2d at 538; *see also, General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 977-78 (9th Cir. 1983) (summary judgment for defendant re equipment-service tie affirmed). That is also evident from a straightforward application of the elements of an unlawful tie-in to the facts of this case.

1. Kodak Does Not Tie Two Products Together.

The first element of any tying arrangement is that the sale of one product is conditioned on the buyer's willingness to purchase a second, distinct product. *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1345 (9th Cir. 1987), *cert. denied*, 57 U.S.L.W. 3235 (Oct. 3, 1988). This not only defines the offense, it is central to defining the anticompetitive consequences of some tying arrangements, *i.e.*, the fact that customers are forced to buy a product which they otherwise would not buy. *See Hyde*, 466 U.S. at 12.

Throughout this litigation, Plaintiffs have paired up nearly every possible combination of Kodak equipment, parts, and service in search of a tying arrangement. On appeal, they pursue only one theory. They allege that Kodak has used its control over replacements parts (the "tying product") to force its customers to buy Kodak service (the "tied product").

That is simply and indisputably not true. Kodak does not require its copier or micrographics equipment customers to purchase Kodak service, and it does not prevent them from servicing their own equipment or

utilizing ISOs. Any Kodak equipment customer that wants to service its own equipment may buy all the parts it needs for that purpose from Kodak without any obligation to buy anything else. Of course, the customer must already own Kodak equipment, but they need not buy Kodak service, the alleged "tied product." Kodak's policy would constitute tying only if it required its parts customers to buy Kodak service to get parts. Indisputably, Kodak has no such requirement.

Plaintiffs' "tying" case is in reality based on the contention that Kodak will not sell parts to its equipment customers if it knows they will use an ISO, or if they are an ISO and want to use the parts to provide third party service.[4] (A.O.B., p. 21) That is still not tying. Tying arrangements force customers to buy something they do not want, not merely to refrain from buying or doing something they do want. Plaintiffs' argument simply points out that Kodak's unilateral refusal to sell parts to ISOs operates both directly, by not making sales to the ISOs themselves, and indirectly by not allowing ISOs to

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[4] Plaintiffs also try to carve out a narrow exception with respect to Kodak equipment sold by someone other than Kodak, what they call "brokered" equipment. (A.O.B. p. 21) Plaintiffs neglect to inform the Court that Kodak does not broker equipment. It only sells equipment directly to its customer. (Record, No. 14, Murray Decl. ¶¶ 24, 33; No. 15, Lacy Decl. ¶ 3) As to used equipment that may be sold by somebody else, Kodak requires that the equipment is in working order before it will offer service. (Murray Decl. ¶ 34; Gross Decl. ¶ 5) In any event, plaintiffs have abandoned on appeal their allegations that Kodak's used equipment policy is unlawful.

make arrangements with Kodak customers to circumvent the policy. Kodak has always admitted that it engages in that unilateral refusal to deal, and it is precisely what *Bushie, Calculators Hawaii,* and *Dimidowich* say Kodak may lawfully do. It is not tying.

2. Parts and Service Are Not Separate Products.

Another element of a tying arrangement is that the two products tied together must be economically distinct. *Hyde,* 466 U.S. at 19. There must be "sufficient demand" for one product so that "it is efficient to offer" that product separately from another. *Id.* at 21-22. Components of a single product can be packaged together without being deemed a tying arrangement. *Casey v. Diet Center, Inc.,* 590 F. Supp. 1561 (N.D. Cal. 1984).

Parts and service are not separate products for purposes of a tying analysis. Customers have no interest in having one without the other. Parts are sold only to facilitate service and service is dependent upon parts. There is no separate demand for each, *see, Hyde,* 466 U.S. at 19; to the contrary, the demand for parts is entirely derivative of the demand for service. For example, in *Allen-Myland, Inc. v. IBM Corp.,* 1988-2 Trade Cases, ¶ 68, 193 (July 22, 1988) the court found that the parts to a computer upgrade program and the service to install those parts were not separate products. *Id.* at 59,279. Customers may have wanted various suppliers of both, but had little interest in having parts and service supplied separately. *Id.*

Indeed, appellant's theory of their case effectively concedes that there is no separate demand and no efficient market for parts. Plaintiffs claim that they cannot obtain parts anywhere other than Kodak. (Record, No. 1, ¶ 23; A.O.B., p. 2) If parts could be sold efficiently in a separate market, they would be available to plaintiffs from some source other than Kodak. Plaintiffs cannot simply freeride on Kodak for its parts on the basis of an alleged tie between two distinct products.

Like a belt and its buckle, *Jack Walters & Sons Corp. v. Morton Building, Inc.,* 737 F.2d 698, 704 (7th Cir. 1984), or an engine and its warranty, *Klo-Zik Co. v. General Motors Corp.,* 677 F. Supp. 499 (E.D. Tex. 1987), parts and service are two sides of the same coin. Parts are worthless without service to install them, and service has no value without parts. They are not separate products.

3. Kodak Lacks Market Power

The next element of an unlawful tying arrangement is the possession by the defendant of "some special ability — usually called 'market power' — to force a purchaser to do something that he would not do in a competitive market." *Hyde,* 466 U.S. at 13-14; *Mozart,* 833 F.2d at 1345. Tying arrangements cannot harm competition if the seller lacks market power. "The primary purpose of the rule against certain tying arrangements is to stop the extension of market power from one product to another. [That] is impossible unless the seller has substantial market power in the tying product." *Mozart,* 833 F.2d at 1345 [citations omitted].

Plaintiffs concede that Kodak lacks market power in either of the relevant interbrand equipment markets, *i.e.*, the copier and micrographics equipment markets. They also concede that new purchasers could choose among many equipment vendors (and their associated service offerings) if the total costs of using Kodak equipment — including parts and service costs — were to rise substantially. (A.O.B., pp. 44-45) That means that Kodak lacks market power in not only the equipment markets, but also in the aftermarkets (even assuming they are separate markets) for parts and service.[5] The fact that Kodak customers can switch to competing equipment if Kodak tried to raise the price of parts or service is irreconcilable with plaintiffs' contention that Kodak has market power over parts. *See*, F.M. Fisher, et al., *Folded, Spindled, and Mutilated: Economic Analysis and U.S. v. IBM* (MIT Press 1983) at 202 (excerpts found in Authorities Appendix to Kodak's Reply Brief in Support of Motion for Summary Judgment).

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[5] New customers and those who wish to replace or upgrade their equipment take into account the parts and service costs when choosing equipment. (Record, No. 14, Lacy Decl. ¶ 18, No. 15, Murray Decl. ¶ 16). The same is true of customers who stagger their purchases over time since there are no technological "lock-ins." (Record, No. 43, Spies Decl. ¶¶ 4-8). As to customers who have already purchased equipment, will not upgrade, and have no plans for any future purchase, they will pay the same price for parts and service as everyone else. That is because competition for new customers (or those otherwise free of any theoretical lock-in) sets the market price. See F.M. Fisher, at 202. The ultimate proof that Kodak customers are not locked-in is the fact that Kodak regularly loses existing customers to its equipment competitors. (Record, No. 15, Lacy Decl. ¶ 17; No. 14, Murray Decl. ¶ 16)

The Ninth Circuit recognized this on closely analogous facts in *General Business Systems v. North American Philips Corp.*, 699 F.2d at 977-78. There the defendant Philips was a computer maker that was charged with using its market power in an alleged service market to force its customers to buy its own magnetic ledger cards ("mlcs"). Thus mlcs (the "tied products") were said to be tied to service (the "tying product"). The court affirmed a summary judgment for Philips on the ground that interbrand equipment competition precluded any finding of market power over service. *Id.* at 977. The relevant equipment market — small business computers — was highly competitive. and the Court found that any attempt by Philips to exercise market power with respect to service "only would have hastened the date on which Philips surrendered to its competitors in the small business computer market." *Id.*

Plaintiffs' market power case ignores the forces of interbrand equipment competition. They argue instead that Kodak has market power over parts simply because Kodak parts are "unique." (A.O.B. at 31.) That is true in a literal sense, but no more true than the general proposition that *all* branded products are "unique." *See United States v. E.I. du Pont & Co.*, 351 U.S. 377, 393 (1956) ("one can theorize that we have monopolistic competition in every nonstandardized commodity"). The important point is that so long as consumers can switch to Kodak's many competitors should Kodak try to exert market power by forcing its parts customers to buy other products, there is *a fortiori* no market power over parts. That is true whether or not the parts are "unique."[6]

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[6] The allegation that some parts may be patented does not add anything to plaintiffs' "uniqueness" argument and by

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Plaintiffs' market power case also relies heavily on this Court' controversial decision in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984).[7] Plaintiffs allege that existing Kodak equipment customers (but not new prospects) are "locked-in" to Kodak products such that they cannot switch to competing vendors if Kodak tries to exert market power over parts. They claim that in *Digidyne* this Court established that a lock-in is sufficient to prove tying market power.

Plaintiffs are wrong on both the law and the facts. First, there is nothing in *Digidyne* to suggest that a manufacturer which, like Kodak, indisputably faces strong interbrand equipment competition can be found to have market power on the basis of a lock-in. In fact, *Digidyne* strongly implies the contrary. Data General argued that lock-in was irrelevant in determining its market power because buyers were aware of the potential lock-in when initially selecting Data General's product and could

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itself makes no difference. *See Hyde*, 466 U.S. at 37, n. 7; *Allen-Myland* at 59,272-73; *Klo-Zik*, 677 F. Supp. at 499.

[7] *Digidyne's* analysis has been expressly rejected by several courts. *See A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n. 4 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *Allen-Myland* at 59,273, n. 42; *Tominaga v. Shepherd*, 682 F. Supp. 1489, 1495 (C.D. Cal. 1988). In addition, Justices White and Blackmun -- two of the five Justices who favor retention of the per se rule in tying cases -- would have granted certiorari in *Digidyne*. *See* 473 U.S. 908 (White. J., joined by Blackmun, J., dissenting from denial of certiorari). The Ninth Circuit itself criticized and narrowly interpreted *Digidyne* in *Mozart*, 833 F.2d at 1346 n. 4. It is not a case to be read expansively.

choose not to lock themselves in. *Id.* at 1342. The Ninth Circuit did not quarrel with the logic of this argument; indeed it seemed to accept it. Rather, the Court found that factors other than the lock-in gave Data General that initial leverage. *Id.* at 1343 (citing the copyright protection of Data General's product, its "special attraction," trade secret barriers, and other barriers to the development of comparable products). Here, it is undisputed that consumers may freely choose between a wide variety of vendors when initially choosing copiers or micrographics equipment. (Record, No. 14, Murray Decl. ¶ 5; No. 14, Lacy Decl. ¶ 8; A.O.B., pp. 44-45) It is also undisputed that copier and micrographics equipment customers consider long term parts and service costs when choosing between Kodak and its equipment competitors. (Record. No. 14, Murray Decl., ¶¶ 15, 22; No. 15, Lacy Decl., ¶ 14; *see also* p. 30, n.5, *supra*) Nothing in *Digidyne* suggests that a lock-in can prove market power under those circumstances.

Second, Plaintiffs have failed to raise a triable issue regarding the existence of any meaningful lock-in. At the District Court, Plaintiffs' lock-in case was based primarily on a totally unfounded allegation that compatibility requirements between components of a micrographics system prevented customer switching. They have now wisely abandoned that allegation. All they are left with is a senseless claim that that because Kodak equipment loses value after it is purchased, customers would prefer to hold on to the equipment for its full useful life.

The District Court correctly rejected this argument. Almost every product has a lower "used" price than its "new" price; it is practically American folklore that an

automobile loses value the minute it leaves the showroom. But that does not and cannot mean that every manufacturer of a product that loses value has market power or that its customers are locked-in to it. Consumers can be expected not to buy durable goods unless they are satisfied that they are not committing to a poor or costly product. This is the point that the Ninth Circuit noted, and seemed to concede, in *Digidyne*, 734 F.2d at 1342. There is, moreover, undisputed evidence that copier and micrographics customers consider long term costs before committing to Kodak or any other vendor. (Record, No. 14, Murray Decl. ¶ 22; No. 15, Lacy Decl. ¶ 14) There is no probative evidence to the contrary.[8]

Therefore, the undisputed evidence proves that Kodak (a) did not tie service to parts, and (b) could not

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[8] The evidence plaintiffs rely on is both senseless and inadmissible. They claim, for example, that a copier selling for $75,000 new has a $2,500 resale value after two to three years, or just twenty percent of what plaintiffs claim is its 14 year useful life. (A.O.B., p. 10) If that were true — if one could really purchase eighty percent of the value of a copier for less than four percent of its original price — no customer would ever buy a new copier, at least not unless Kodak lowered its new equipment prices drastically. Yet contradictorily, plaintiffs insist that the market for these alleged bargains has "dried up." (Record No. 40, Vaning Decl. ¶ 20) Of course, none of this could really happen. Moreover, plaintiffs cite no admissible evidence to support their claim. Plaintiffs speak in conclusory terms of the "drop" in prices for unspecified equipment of unspecified condition. (*Id.* ¶ 16) Their declarations fail to mention the specific price of even a single used copier, let alone the age of the copier, or its price when it was new. (*See* Record. No. 40, Hermandez Decl. ¶ 56) These "facts" simply do not support the proposition plaintiffs assert.

have adversely affect competition had it done so since it has no market power in the tying market.

4. Kodak's Parts Policy is Justified by Valid, Pro-competitive Business Reasons.

In *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1349 (9th Cir. 1987), *cert. denied*, 57 U.S.L.W. 3235 (Oct. 3, 1988), this Court held that even an otherwise unlawful tying arrangement "does not violate the antitrust laws 'if implemented for a legitimate business reason and if no less restrictive alternative is available.' " *See also, Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 739 (9th Cir. 1981, *cert. denied*, 459 U.S. 1145 (1983). *Mozart* concluded that Mercedes-Benz' requirement that its franchisees use only Mercedes-Benz manufactured replacement parts in their service operations was justified by quality control considerations. *Mozart*, 833 F.2d at 1348-51. Mercedes-Benz could compel its dealers to use only its parts in order to prevent substitution of inferior parts by dealers "freeriding" on the overall quality of Mercedes-Benz service. *Id.* at 1349.

Even if Kodak's policy were a tying arrangement, which it is not, it would be justified by Kodak's legitimate business interests. Kodak has adopted the parts policy because (a) it believes that by taking direct responsibility for the repair and maintenance of its products it can better compete against other equipment manufacturers, (b) it can reduce inventory costs, and (c) it does not want to support free-riders who do nothing but take away revenues that are rightfully part of Kodak's return on its investment in manufacturing. Every one of those reasons,

and the parts policy itself, promotes interbrand competition between equipment manufacturers. And that, interbrand competition, "is the primary concern of antitrust law." *Sylvania*, 433 U.S. at 52 n.19.

The courts have frequently recognized that promoting good service in order to make a product more attractive fosters interbrand competition. Thus, they have upheld against antitrust challenge a wide variety of vertical restrictions designed to improve a manufacturer's competitiveness by assuring adequate service for the manufacturer's products. *See, e.g., Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195-1201 (6th Cir. 1982); *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 663 F.2d 405, 410 (2d Cir. 1981). In *Sylvania* itself, the Supreme Court recognized that "service and repair are vital for many products," and that restrictions designed to ensure adequate service of a manufacturer's products could make those products more attractive, and thereby enhance interbrand competition. 433 U.S. at 55.

Kodak's desire to reduce inventories by not making. buying or stocking parts for ISOs is also pro-competitive. Eliminating costs unnecessary to delivering its own product — Kodak equipment and associated service — makes Kodak more efficient. Promoting efficiency is one of the principal goals of the antitrust laws. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 21-22 (1979); *N.C.A.A. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 103 (1984). Interbrand competition is directly served by policies which increase Kodak's efficiency.

Finally, the courts have frequently recognized that interbrand competition is promoted by policies which eliminate free riders. *Sylvania*, 433 U.S. at 55; *Mozart*, 833 F.2d at 1349; *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011, 1015 (9th Cir. 1982), *cert. denied*, 464 U.S. 829 (1983) (firms "more likely to expend the effort necessary to promote or service a product if they did not have to worry about [others] taking a 'free ride' on their efforts"); *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1468 (9th Cir. 1986) (elimination of "free riders" to promote interbrand competitiveness "is both legitimate and lawful."). Therefore, Kodak's refusal to support the efforts of ISOs to free ride on Kodak's investment in the copier and imaging equipment businesses is also pro-competitive.

Therefore, even if one were to assume that Kodak's policy was a tying arrangement, it would not be unlawful under *Mozart*.

B. *Aspen* Does Not Obligate Kodak to Sell Parts to Appellants.

Plaintiffs' second major argument on appeal is that, under the Supreme Court's *Aspen* decision, Kodak could not lawfully change its policy and refuse to sell ISOs parts after initially having made such sales. This argument, which was not raised below, is specious.

To begin with, *Aspen* is a Sherman Act § 2 case in which the defendant conceded that it possessed monopoly power in the relevant market. 472 U.S. at 596. It concerns the obligations that monopolists have to deal

with their competitors. It says nothing about the obligations of a firm like Kodak, which indisputably lacks market power in the copier and micrographics equipment markets. *Bushie, Calculators Hawaii,* and *Dimidowich* establish that manufacturers lacking interbrand market power need not sell parts to competitors.

Second, contrary to plaintiffs' argument, *Aspen* does not stand for a broad proposition that monopolists who choose to deal with their competitors can never change their minds. The issue in *Aspen* was much more narrow. The plaintiff and the defendant had voluntarily agreed to participate in a joint marketing arrangement in which their separate products (skiing at their respective mountains) were sold together in an all-Aspen lift ticket. *Id.* at 589-93. The cooperative venture had originated at a time when the market was competitive, it persisted for sixteen years, and the Supreme Court clearly felt that in light of its longevity and consumer acceptance it was the "optimal" pattern of distribution in the relevant market. *Id.* at 604-07 & n. 31. The defendant terminated its participation in the venture after it acquired monopoly power, and notwithstanding its willingness to continue participating in similar ventures in other markets where it was not a monopolist. *Id.* at 608-09. Moreover, the defendant had "fail[ed] to offer any efficiency justification whatever" for its unwillingness to continue the venture. *Id.* at 608.

Cases decided subsequent to *Aspen* have interpreted it narrowly. *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), held that a monopolist could lawfully extend help to new entrants and later withdraw that support. "A monopolist has no duty . . . to extend a helping hand to new entrants." 797

F.2d at 376, *citing California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 744 (9th Cir. 1979).[9] Similarly, in *Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 57 U.S.L.W. 3235 (Oct. 3, 1988), this Court recently declined to read *Aspen* expansively. The Court held that even monopolists have a duty to assist competitors *only* when there is no business justification for the refusal. *Id.* at 368. That is clearly not the case here. (*See* pp. 9-13, *supra*)

In any event, the facts in *Aspen* are not even remotely comparable to the case at bar. The plaintiff and defendant in *Aspen* banded together to offer a joint product to the public, because that cooperative effort increased the profitability of both. Such a mutually beneficial cooperative relationship has never existed between plaintiffs and Kodak. To the contrary, plaintiffs simply allege that, in the past, they purchased some parts from Kodak, in order to offer those parts to others, in an effort to take revenues

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[9] Plaintiffs' argument that this case is an "essential facility" case under *Olympia Leasing*, and that Kodak is therefore obligated to provide parts to them (A.O.B., p. 46) is ill-conceived and unavailing. Plaintiffs are not pre-existing parts "customers" who have chosen to compete with Kodak for service contracts. Other than to take revenues away from Kodak, they have no desire for the Kodak parts they wish to buy. In any event, this case cannot be an essential facility case. As in *Olympia Leasing*, the purportedly monopolized facility is potentially available to plaintiffs. They simply prefer not to look to other sources or to make the investment necessary to develop the parts themselves. Just as *Olympia* "had no right to take a free ride on its competitor's sales force." 797 F.2d at 377-78, plaintiffs have no right to free ride on Kodak's parts investment.

away from Kodak.[10] They were, in short, free riders. That is not the type of special, efficient relationship that existed in *Aspen*.

Neither is there any evidence here that Kodak made a significant change in its policy: Kodak has always declined to sell copier parts to ISOs, and when it adopted that policy for newly introduced micrographics products, it continued selling parts for its existing micrographics products to ISOs, as it does today. Finally, there is no claim made here that Kodak's decisions to adopt the challenged parts policies were in any way related to its acquisition of monopoly power. To the contrary, it is conceded that Kodak is not a monopolist in the relevant equipment markets. (A.O.B., p. 44) And there is no evidence here that Kodak is willing to cooperate with some ISOs but not others.

Even more fundamentally, Kodak has demonstrated sound, pro-competitive business reasons for its decision not to sell parts to ISOs. *Aspen* explicitly holds that a refusal to deal, even by a monopolist, is lawful if based on valid business reasons. 472 U.S. at 605. This Court, interpreting *Aspen*, recently held that a legitimate business justification will excuse a monopolist's refusal to deal even when the refusal "is based partially on a desire to restrict competition." *Oahu Gas*, 838 F.2d at 368.

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[10] To the extent that Kodak ever sold parts to plaintiffs, it either did so unwittingly (as was the case with respect to sales of copier parts or newer micrographics parts which may have occurred) or in the context of a normal commercial sale (as Kodak has sold *and continues* to sell older micrographics parts to ISOs). (*See* pp. 8, 13-14, *supra*)

Aspen is of no help to plaintiffs. To the contrary, the Supreme Court's carefully limited holding reaffirms that even monopolists may ordinarily refuse to deal with their rivals without violating the Sherman Act.

C. It Is Undisputed that Kodak Acted Unilaterally.

Plaintiffs' complaint alleged a myriad of conspiracies between Kodak and virtually every other type of firm in the copier and micrographics industries (with the exception, ironically, of any Kodak competitor). (Record, No. 1, Complaint ¶¶ 52-56.) These allegations have now evaporated completely. Other than a passing reference in their Statement of Facts (A.O.B., p. 14), plaintiffs do not pursue any conspiracy claim on appeal. No such claim is included in either plaintiffs' Statement of Issues Presented for Review or their Argument. It is thus conceded that Kodak acted unilaterally in adopting and implementing the challenged policies. *A fortiori*, the District Court was correct in granting summary judgment on plaintiffs' Section 1 claims. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984) ("Independent action is not proscribed" by Section 1); *Spectrofuge Corp. v. Beckman Industries, Inc.*, 575 F.2d 256, 286 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979) ("It is axiomatic that unilateral activity by a single firm cannot be reached with this section").

CONCLUSION

This case stands for the simple proposition that a manufacturer which lacks market power cannot be forced to sell replacement parts to freeriders who would rather

not make their own parts. *Bushie* established the principle sixteen years ago; *Calculators Hawaii* and *Dimidowich* reaffirmed it; and it has spread to every other circuit to consider the issue.

There is no question that Kodak has a significant advantage over plaintiffs in competing for service business: Kodak has plenty of parts. But Kodak has those parts because it has invested in the development and manufacture of copiers and micrographic equipment, investments which undoubtedly benefitted both competition and consumers — indeed, which also benefitted plaintiffs. As a "reward" for its efforts. Kodak should not now be required "to immolate itself" by selling ISOs parts that can only be used to take away revenues that would otherwise reward Kodak's investment. *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441, 443 (1st Cir, 1980). Such a rule makes no sense. It would deter investment in manufacturing and thus would be distinctly anticompetitive.

Accordingly, the District Court's order granting Kodak's motion for summary judgment should be affirmed.

Dated: November 10, 1988

Respectfully submitted,

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STATEMENT OF RELATED CASES

Eastman Kodak Company is aware of no case pending before this Court that is related to this case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 88-2686

IMAGE TECHNICAL SERVICES, INC., et al.

Plaintiffs-Appellants,

v.

EASTMAN KODAK COMPANY,

Defendant-Appellee.

APPEAL FROM THE SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION.

Although it is presented in many different forms, the argument in appellee Kodak's response brief can be reduced to one simple proposition: the antitrust laws do not "impose a duty" on a firm such as Kodak to assist its competition. Of course, the Sherman Act imposes no such duty, and appellants do not contend otherwise. The antitrust laws *do*, however, impose a duty on a firm such as Kodak to compete fairly, and over the years that duty has been interpreted to prohibit tie-ins and sudden cut-offs of arrangements by a monopolist to destroy competitors. It is just such conduct that Kodak has engaged in here, and although many pages of Kodak's response brief ("K.R.B.") are devoted to justifying such conduct, Kodak does not seriously dispute that it has occurred.

Plaintiffs announced on page 1 of their brief that this is a tying case brought under Section 1 of the Sherman Act and controlled by *Digidyne*, as well as a monopolist's competitor-exclusion case brought under Section 2 of the Sherman Act controlled by Supreme Court and Ninth Circuit precedents. Kodak tries simply to ignore these facts; it first addresses the Section 1 tying issue on page 25 of its 44-page brief, first mentions *Digidyne* on page 32, and devotes only four pages near the end of its brief to the Section 2 claims (K.R.B. at 38-42). Kodak never mentions the *Otter Tail Power Co. v. U.S.* or the *Pacific Coast Agricultural Export Assn. v. Sunkist Growers* precedents of

the Supreme Court and of the Ninth Circuit, relied upon by plaintiffs, the rules of which, with *Lorain Journal* and *Aspen*, dictate finding a Section 2 violation.

Kodak uses the first half of its brief not to respond to plaintiffs' argument that the district court erred, but rather to regurgitate the same irrelevant argument it made to the district court that this is a refusal-to-deal case controlled by the rationale set forth in some distributor termination cases. Although the district court was misled into error by Kodak's argument, this Court should not be. Try as it might, Kodak cannot convert this tying/competitor-exclusion case into a simple distributor-termination "refusal-to-deal" case.

In their opening brief, plaintiffs anticipated that Kodak would resurrect its "refusal-to-deal" argument and went on to demonstrate that:

> [A]lthough Kodak, as sole distributor of its own parts, might not run afoul of Sherman Act Section 1 merely by "choosing" its own customers, Kodak *does* violate that law if, in "choosing" its parts customers, it forces those customers also to buy its service by means of an "impermissible method," such as tying arrangements. Any ability of Kodak legally to refuse to deal with ISOs does not insulate it from liability for illegally tying its service to its parts.

(A.O.B. at 36.)

Kodak's response brief nowhere comes to grips with this fundamental reality: *refusal-to-deal cases do not validate illegal tying arrangements*. Otherwise, *every* illegal tying case could be analyzed as, and thrown out of court as, a legal "refusal-to-deal" case. The ruling would be that

defendant does not "tie" product A to product B, it merely "refuses to deal" with those customers who wish to purchase only product B from defendant and who prefer to purchase product A elsewhere. Such reasoning would abolish illegal tying arrangements in this Circuit, yet that is precisely the reasoning Kodak suggests to this Court, and precisely the result Kodak requests this Court to reach. Kodak must not be allowed to escape liability for its illegal tying arrangements by contorting them into simple refusals to deal.

As shown in Section II below, Kodak's response brief admits that Kodak's arrangements with its customers constitute tying arrangements, implicitly admits that the district court "missed" the facts constituting the tie, and tries to justify the tie by means of "[v]alid, [p]ro-competitive [b]usiness [r]easons." (K.R.B. at 35.) Because the district court "missed" the tie, neither side's factual contentions regarding the legality of the tie were ever addressed by that court, and this two requires reversal. The erroneous summary judgment of the district court – granted without the benefit of oral argument and based on a conceded misunderstanding of the facts – must be reversed and a determination made whether plaintiffs' evidence in this record makes Kodak's tie-ins *per se* illegal or whether the case should be remanded to the district court for determination, by the finder of fact of whether Kodak's "business reasons" validate its tie.

As shown in Section III below, reversal is also required because the principles set down in *Otter Tail, Lorain Journal, Aspen* and *Pacific Coast Agricultural Export Association* preclude Kodak, under the circumstances present here, from exerting its conceded monopoly power

over the sale of Kodak *parts* at wholesale to put competitors out of business at a different level of distribution – the sale of *service* to Kodak equipment owners at retail. Kodak's basic argument that "interbrand competition" for *new machines* justifies its monopolization of service and elimination of service competitors because the interbrand market is the only relevant market to measure market power and competitive effect, does not comport with reality. As Chief Justice Hughes stated in *Appalachian Coals, Inc. v. U.S.* 288 U.S. 344, 360, 377 (1933) (as quoted in *Sylvania*, 433 U.S. at 47):

> "Realities must dominate the judgment . . . . The Anti-Trust Act aims at substance".

The simple reality and substance is as described by this Court in *Dimidowich*:

> [A]n owner of broken B & H micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the owner's only option is to request service from B&H or Comgraphix (depending on his location) [both B&H repairers], that is obviously the market the owner faces. 803 F.2d at 1481 n.3.

The realities are: (1) an owner of Kodak equipment looks to service offered for Kodak machines, not "interbrand competition" in equipment; (2) ISOs cannot service Kodak equipment without Kodak replacement parts, the market for which Kodak monopolizes; and, (3) the elimination of ISO service, if Kodak prevails, will have a tremendous anticompetitive impact on competition for *service* of Kodak machines. There are three relevant markets here: (1) the new equipment market; (2) the parts market; and (3) the service markets.

II. KODAK HAS ADMITTED ITS TYING ARRANGEMENTS, AND THE ELEMENTS OF PER SE VIOLATIONS HAVE BEEN ESTABLISHED.

Kodak in its brief concedes precisely the three arrangements identified in plaintiffs' opening brief whereby Kodak ties service (the tied product) to its parts (the tying product). It characterizes these arrangements as follows:

> Plaintiffs' "tying" case is in reality based on the contention that Kodak will not sell parts to its equipment customers if it knows they will use an ISO [for service], or if they are an ISO and want to use the parts to provide third party service . . . Plaintiffs also try to carve out a narrow exception with respect to Kodak equipment sold by someone other than Kodak, what they call "brokered" equipment.

(K.R.B. at 27 and 27 n.4.)

Kodak thereafter fails to offer any factual evidence which refutes that these arrangements exist. Kodak cannot, since its own evidence confirms the ties. Kodak, however, attempts to escape these ties in three ways: (1) it claims the ties are just a "contention"; (2) it invents its own definition of a tie and says these ties do not fit; (3) it says these are not ties at all but rather legal refusals to deal. All three arguments fail.

A. The Tie-Ins Exist As A Matter Of Law.

Kodak refers to these three ties as a "contention" because the district court simply missed them. Indeed, the court below erroneously found "[t]here is no evidence of any such [*Northern Pacific* tying] arrangement in this

case." (Excerpts, p. 5, ll. 4-5.) To the contrary, there is *overwhelming* evidence of these three ties that was extensively quoted in plaintiffs' opening brief, all of which evidence is included in the Excerpts of Record. (A.O.B. at 20-26.) That evidence includes Kodak's own verified interrogatory answers, Kodak's own declarations in support of its summary judgment motion, the sworn deposition testimony Kodak's own witnesses (under questioning by Kodak's own attorneys), and Kodak's own documents contemporaneously prepared by Kodak personnel in charge of implementing Kodak's restrictive parts sales policy. Kodak did not provide to the court below any evidence to rebut these tie-ins. This Court should therefore find as a matter of law that the facts support these tie-ins.

B. The Tie-Ins Fall Within the *Northern Pacific* Rule.

Recognizing that there is unchallenged evidence for plaintiffs' tying "contention," Kodak next asserts "[t]hat is still not tying" (K.R.B. at 27) and then, without citation to authority, invents its own definition of tying: "Tying arrangements force customers to buy something they do not want, not merely to refrain from buying or doing something they do want." (*Id.*) That is a clear misstatement of the law. Plaintiffs submit that this Court should rely on the Supreme Court's definition of tying in *Northern Pacific*, rather than on Kodak's new invention. The Supreme Court's definition is considerably more expansive than Kodak's, and makes it clear that the existence of a violation does not turn on whether the purchaser "wants" the second, tied product:

> [A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.

(*Northern Pacific Ry. v. U.S.*, 356 U.S. 1, 5-6 (1958) (footnote omitted).)

The second clause of the *Northern Pacific* definition shows that a tying arrangement exists if the sale of the tying product (parts) is conditioned on the buyer's agreement that it will not purchase the tied product (service) "from any other supplier," *i.e.*, on the condition that buyers (in contradiction of Kodak's definition) "refrain from buying or doing something they do want," namely, buying the tied product (service) at a better price from a different supplier (an ISO). As shown in plaintiffs' opening brief, Kodak conditions the sale of its parts in three ways, each of which constitutes a tie under *Northern Pacific*: Kodak sells parts to equipment owners (1) on the *condition* that they agree not to purchase service from an ISO; (2) on the *condition* that they also purchase Kodak service if they own equipment that was purchased as used equipment (referred to as "brokered equipment" in plaintiffs' opening brief); and/or (3) on the *condition* that they also purchase Kodak service if they are an ISO (lest the ISO use the parts to service its customers' machines).

C. The Tie-Ins Are Not Simple Refusals To Deal.

These three admitted *conditions* on Kodak's sales of parts to Kodak Equipment owners demolish Kodak's third argument to escape tying liability, which is Kodak's

almost ludicrous assertion that it does not sell parts under "any" conditions and hence is engaging in a simple refusal to deal:

> If one refuses to sell a product under *any* conditions, as Kodak refuses to sell parts to ISOs, that is a unilateral refusal to deal, not a tying arrangement.

(K.R.B. at 25.)

Kodak's sales of its parts to Kodak equipment owners, subject to the three conditions enumerated above, constitute a *Northern Pacific* tying arrangement, pure and simple.

D. Kodak's "Refusal to Deal" Defense Does Not Insulate It From the Illegal Tie-Ins.

It is true, of course, that *apart* from its tying arrangement with its equipment owners, Kodak, in order to monopolize service, *also* now refuses to sell parts directly to its competitor-ISOs, although it formerly did. That refusal to sell to competitors ("competitor exclusion") violates the principles of *Otter Tail, Lorain Journal, Aspen* and *Pacific Coast Agricultural Export Assn.*, as discussed in Section III below. But Kodak's sudden blanket refusal to sell parts *to ISOs* does not make Kodak's conditional sales *to equipment owners* any less of a tie. As stated in plaintiffs' opening brief, "[a]ny ability of Kodak legally to refuse to deal with ISOs does not insulate it from liability for illegally tying its service to its parts." (A.O.B. at 36.) Kodak in its "responsive" brief does not mention – much less refute – that statement, because it is irrefutable. Thus, Kodak's extensive reliance on distributor-termination

cases such as *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972), which uphold certain limited refusals to deal as vertical non-price restraints by a manufacturer substituting one exclusive distributor for another, is inapposite to Kodak's conditional sales of parts to its equipment owners, which constitute tying arrangements.

That refusal-to-deal cases are inapposite to tying cases was explained by the first case cited on page 1 of Kodak's responsive brief, *Dimidowich v. Bell & Howell*, 590 F. Supp. 45 (C.D. Cal. 1984), *tying claim withdrawn on appeal*, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (9th Cir. 1987). There, as established in plaintiffs' opening brief (and never refuted by Kodak in its responsive brief), the district court first found that Bell & Howell's parts policy did not constitute a tie because, unlike Kodak's policy, a Bell & Howell equipment owner *could* purchase a part from Bell & Howell and purchase the service to install that part separately from an ISO. (590 F.Supp. at 49; 803 F.2d at 1475; A.O.B. at 40-41.) After finding no tie, the court went on to determine whether the *Bushie* refusal-to-deal cases *independently* required Bell & Howell to sell parts directly to ISOs and concluded that, "absent impermissible methods and effects," they did not. (590 F.Supp. at 49-50 and 50 n.7; A.O.B. at 36.) A tying arrangement is clearly an "impermissible method." The *Dimidowich* court recognized this by first examining Bell & Howell's policy to determine if it constituted a tie. If it did, the *Bushie* refusal-to-deal line of cases would not have justified that tie (as Kodak incorrectly urges here). Otherwise, the *Dimidowich* court would simply have cited the *Bushie* refusal-to-deal principle, and never bothered to examine whether there was a tie.

That is what Kodak convinced the district court to do in this case, and is now trying to have this Court do: declare that the *Bushie* refusal-to-deal principle insulates Kodak from liability even for utilizing "impermissible methods" such as its tie-ins.

The only issue in this case is *not*, as Kodak suggests, whether "the antitrust laws impose a duty on a manufacturer . . . to sell replacement parts *to ISOs* . . . . " (K.R.B. at 2, emphasis supplied.) The issue with regard to Section 1 of the Sherman Act is whether the antitrust laws forbid Kodak from illegally tying its service to its parts when it sells parts *to its equipment owners*. The antitrust laws do forbid such conduct.

Kodak apparently recognizes this, for it offers ten pages of "assuming *arguendo*" arguments suggesting that "even if one were to assume that Kodak's policy was a tying arrangement, it would not be unlawful" under a variety of rationales. (K.R.B. at 28-38.) Of course, each of these arguments at best raises issues of fact, none of which were addressed by the court below because that court completely missed the tie. Plaintiffs in their opening brief demonstrated, by extensive citation to the record that they advanced in the district court, overwhelming evidence to show, at the very least, "genuine factual issues that can be resolved only by a finder of fact *because they may reasonably be resolved in favor of either party*," to quote *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 698 (1988) (emphasis in original), relied on by Kodak. Accordingly, reversal and remand is required.

E. Parts and Service Constitute Separate Products.

In its first *"arguendo"* argument, Kodak asserts that "[p]arts and service are not separate products," but, "[l]ike a belt and its buckle," are "two sides of the same coin." (K.R.B. at 28-29.) But plaintiffs have already shown in their opening brief that, according to the Supreme Court in *Jefferson Parish*, the test is whether there are "two distinct markets for products that [are] distinguishable in the eyes of buyers." (*Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 19 (1984); A.O.B. at 28-29.) The existence of distinct markets distinguishable to buyers is a *factual* question that turns on the testimony of buyers and the actions of sellers. Plaintiffs believe they have demonstrated as a matter of law that parts and service are separate products, because Kodak admits it sells parts *separately* from service to "[a]ny Kodak equipment customer that wants to service its own equipment . . . " (K.R.B. at 26), and because customers in large numbers buy parts and service separately. Surely, in *those* buyers' eyes, parts are distinguishable from service. The very existence of the extensive customer base of the eighteen plaintiffs from throughout the United States in this action (customers whose parts are purchased from Kodak but whose service comes from ISOs), shows separate and distinguishable products. Kodak has offered no evidence to refute this.

This Circuit in *General Business Systems v. North American Phillips Corp.*, 699 F.2d 965 (9th Cir. 1983), relied upon by Kodak, recognized that accessory parts for small business computers could constitute a tied product, and that service on those computers could constitute a tying product (or service):

> [Plaintiff] rests its tying claim on an alleged attempt by [defendant] to expand sales of [defendants' specially manufactured accessory parts called] mlcs, the tied product, by denying service and warranty protection, the tying service, to computer owners who did not use these mlcs.

(699 F.2d at 977.)

Here, of course, it is Kodak's replacement parts which are the tying product, and Kodak's service which is the tied product, but the *General Business* analysis is directly applicable.

Indeed, in the principal "separate products" case relied upon by Kodak, *Allen-Myland, Inc. v. IBM Corp.*, 1988-2 Trade Cas. ¶ 68,193 (E.D. Pa. 1988), the district judge, following *Jefferson Parish*, cited and quoted extensive testimony of "end-users" of the product and service at issue to the effect that those users "had no interest in separately acquiring the parts for upgrades and shopping around for installation services." *Id.* at 59,279 and n.71. Only after this factual inquiry did he conclude that the peculiar service and parts at issue there were not separate "products" for tying purposes. Here, Kodak's own documents show that many of its equipment owners prefer ISO service (A.O.B. at 22-28 and 32) but cannot use ISOs because, if they do, Kodak will not sell them parts (K.R.B. at 27). These customers clearly recognize parts and service as separate products.

This record supports a finding that parts and service *are* separate products. Even if the factual determination of what buyers perceive to be separate products cannot be made in this tribunal on this record, the judgment must

still be reversed and the case remanded for a determination of this by the trier of fact.

F. Kodak's "Business Reasons" Do Not Insulate It From the Illegal Tie-Ins.

Similarly, Kodak's suggestion (K.R.B. at 35-38) that "valid, pro-competitive business reasons" (such as recovery of research costs and "interbrand competition") justify its otherwise unlawful tying arrangement, citing *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342 (9th Cir. 1987), *cert. denied* 109 S.Ct. 179 (1988), is not supported by the record. Plaintiffs submit that Kodak has an uphill battle on this issue, since *Mozart* holds that business reasons can justify ties *only* "if no less restrictive alternative is available," 833 F.2d at 1349, *quoting Phonetele, Inc. v. AT&T*, 664 F.2d 716, 739 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983). The record shows that plaintiffs are willing to, and do, pay prices 100% higher than other customers of Kodak for parts, that Kodak can thus recoup its research, development and inventory costs through sensitive pricing of its replacement parts, and that such a pricing mechanism is much "less restrictive" than Kodak's tying arrangement. Plaintiffs demonstrated this in their opening brief, but Kodak, again, was unable to respond. As discussed in Section III. E. below, Kodak's other "business reasons" proffered for its policy changes are invalid as well.

G. Kodak Has Relevant Market Power.

Kodak next submits that it lacks market power in every conceivable market and aftermarket. (K.R.B. at

29-35.) Again, the district court did not consider what markets are relevant to this tying case, *or* what degree of market power ("ability to force") must be demonstrated, but merely "[a]ssum[ed] without deciding that such a market [for service] can be found to exist and that Kodak has market power in it," and that "Kodak has, of course, a natural monopoly over the market for parts." (Excerpts, p. 70, ll. 22-23; p. 71, ll. 1-2; A.O.B. at 37.) Worse yet, the lower court totally misapprehended plaintiffs' argument that a *Digidyne* economic lock-in enhanced Kodak's "ability to force" here. (A.O.B. at 33-35.) However, that court *did* make a finding of fact, favorable to plaintiffs and unchallenged by Kodak on appeal, that Kodak equipment owners tend to retain their equipment "for its economic life." (Excerpts, p. 70, ll. 4-7.) That finding sinks Kodak's "interbrand competition at the equipment level" argument, upon which it bases its *entire* argument that it has no market power in the parts or service aftermarkets. The only view consistent with reality is this Court's recognition in *Dimidowich* that "an owner of broken- . . . micrographic equipment is indifferent to people who can service [other brands of] machines. The owner's *only option* is to request service from [one who services its brand]." Because, *on this record*, there is an *unchallenged* finding that Kodak owners tend to keep their equipment for its economic life, Kodak's suggestion "that Kodak customers can switch to competing equipment if Kodak tried to raise the price of parts or service" *must* be rejected. (K.R.B. at 30.) Kodak has failed to muster any plausible argument showing lack of market power in parts or service, and determination of whether it can be made by the trier of fact on remand.

Contrary to the suggestion in Kodak's brief, *General Business, supra,* will not assist Kodak in showing a lack of market power upon remand. In *General Business,* the court recognized that it was prospective *new* "computer system *buyers,*" *not* "locked-in" computer "*owners*", who "quickly could shift to other [computer] sellers" if supracompetitive prices arose for accessory parts. (699 F.2d at 972.) In *General Business,* the equipment was small computers, vastly less expensive than the Kodak copying and microfilm systems at issue here. (The same is true of *Bushie's* dictating machines and the money handling machines in *Calculators Hawaii, Inc. v. Brandt, Inc.,* 724 F.2d 1332 (9th Cir. 1983).) In such inexpensive-equipment situations, interbrand competition at the equipment level may permit a "quick change" to competing manufacturers if parts and service prices are raised to supracompetitive levels. That is not the case here.

In the case at bar, the relevant inquiry is *not* the market faced by all *prospective* equipment *buyers,* who can shun an equipment seller whose parts and service are priced too high, but rather the market faced by *current* Kodak *owners* of relatively expensive equipment, who on this record *keep* their equipment for its economic life and *do not* and *cannot* economically switch, precisely as recognized in *Dimidowich.* In such a situation, this Court in *Dimidowich,* upon which Kodak principally relies, recognized that:

> [A]n *owner* of broken B&H micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the *owner's* only option is to request service from B&H . . . *that is obviously the market the owner faces.*

(803 F.2d at 1481 n.3.) (Emphasis supplied.)

This is precisely the service (and parts) market faced by Kodak *owners* here. This was emphasized in plaintiffs' opening brief (A.O.B. at 41-42 and 44), but Kodak has made and can make no "response" to it. Kodak never squarely faces and addresses this fundamental fact: The owner of large and expensive Kodak equipment such as copy or micrographic machines *will not abandon that equipment in response to monoplistic or supracompetitive service prices* by Kodak, and *will not replace it immediately with an interbrand competitor.* The relatively small additional costs of such service would not justify the huge cost of replacement. The owner will simply pay Kodak what it asks for the service. This is the simple reality of this case that Kodak cannot rebut, and which destroys Kodak's "interbrand competition" argument.

Nor can (or does) Kodak respond to the authority cited in plaintiffs' opening brief that where, as here, the manufacturer is vertically integrated, it is appropriate "to limit the relevant market to [that] single firm's products." *Spectrofuge Corp. v. Beckman Instruments, Inc.,* 575 F.2d 256, 282 (5th Cir. 1978), *cert. denied,* 440 U.S. 939 (1979); A.O.B. at 39-40. After citing a number of cases, including this Circuit's *Bushie* decision, the *Spectrofuge* court concluded, in language which Kodak concedes by its long, loud silence:

> Analysis of these cases reveals that such a limited [single-brand] market would be appropriate when, for example, the vertically integrated manufacturer uses his dominant position *at one level of competitive activity to eliminate competition at another level.* . . .

(575 F.2d at 282.) (Emphasis supplied.)

These unchallenged *Dimidowich* and *Spectrofuge* holdings that single-brand markets may exist in parts and service, coupled with the *Digidyne* economic lock-in enhancement and the district court's *Digidyne*-consistent finding of fact that Kodak owners keep their equipment for its useful life and are not free to "quickly switch," as well as this Court's pinpointing of the realities faced by an owner of equipment needing service in *Dimidowich*, all provide irrefutable authority that plaintiffs have established, or at least will be able, on remand, to establish, separate service and parts markets and show Kodak's "ability to coerce" therein.

H. Kodak Has Not Acted Unilaterally.

Kodak's final suggestion that there can be no Section 1 violation here because its actions were "unilateral" is wrong on both the facts and the law. Here, Kodak has bilateral agreements with its equipment owners, expressly set out in its "Terms of Sale," that it will sell parts to users "who service *only* their *own* Kodak equipment." (Excerpts, p. 39, emphasis supplied; A.O.B. at 22.) This express restriction in Kodak's customer contracts is precisely the opposite of the facts in the case Kodak cites, *Spectrofuge, supra*, where defendant Beckman's contracts contained "not one word" relating to the alleged tying arrangement and where "Beckman parts were available to anyone, irrespective of who serviced the instruments." 575 F.2d at 288 & n. 97. Kodak's contracts with its customers clearly constitute "contracts . . . in restraint of trade" and are bilateral agreements, not unilateral action. As the *Spectrofuge* court noted, tying arrangements are not "unilateral activity":

> The other cases cited by Spectrofuge involved tying arrangements. These decisions are *totally irrelevant* [to defendant's argument that its action was unilateral].

(575 F.2d at 288, emphasis supplied.)

Plaintiffs have demonstrated Kodak's tying arrangement with equipment owners apart from Kodak's refusal to deal with ISOs. The district court did not recognize the tie. Plaintiffs' unrebutted showing below demonstrates outright the illegality of Kodak's tie, or at the very least, raises genuine issues of triable fact. The summary judgment must be reversed and the case remanded with findings regarding the elements of the tie-ins plaintiffs have established.

III. UNDER THE SHERMAN ACT, SECTION 2, KODAK, WITH MONOPOLY POWER OVER WHOLESALE PARTS, MAY NOT REFUSE TO DEAL WITH ISOS WHO COMPETE FOR RETAIL SALES OF SERVICE IN ORDER TO DESTROY THEM.

A. There Are Limitations on Colgate's Refusal To Deal Dicta.

Kodak's responsive brief ignores plaintiffs' well-accepted exceptions to the dicta in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), that the Sherman Act allows unilateral refusals to deal, even though this dicta forms the cornerstone of Kodak's whole case and its reliance on *Bushie, Calculators Hawaii* and *Dimidowich*. (K.R.B. at 16.) In quoting the *Colgate* language, Kodak purposely (and misleadingly) omits key language of the Supreme Court:

> *"[I]n the absence of any purpose to create or maintain a monopoly,* the [Sherman] [A]ct does not restrict the long recognized right of trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal. . . . "

250 U.S. at 307. (Emphasis supplied.) This language was precisely the language emphasized by the Supreme Court in finding a Section 2 violation in *Lorain Journal v. United States,* 342 U.S. 143, 155 (1951), where the defendant Lorain Journal unilaterally refused to deal with persons who bought advertising from a competing radio station. It was again quoted and relied upon by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985) in finding a Section 2 violation for a unilateral refusal to deal.

The inquiry is therefore not whether Kodak may unilaterally refuse to deal, but whether there is an "absence of *any* purpose to create or maintain a monopoly" in the relevant market.

B. The Essential Facility Doctrine of Otter Tail And Elimination of Rivals in Lorain Journal Apply.

Violations of Section 2 of the Sherman Act have been found when a firm like Kodak, which has monopoly power at one level of a chain of distribution (wholesale parts), refuses to deal with firms at another level of the distribution chain (retail service) in order to drive those firms from business, so that the monopolist can integrate vertically and achieve a monopoly at both levels. The Supreme Court found a Section 2 violation under these circumstances in *Otter Tail Power Co. v. United States,* 410

U.S. 366 (1973). See also *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 375 (1927) (Kodak's monopoly in wholesale photographic supplies found to violate Section 2 where Kodak refused to sell supplies at wholesale to Southern Photo which competed with Kodak at retail).

In *Otter Tail,* the Supreme Court determined that Otter Tail, which had a monopoly over wholesale electric power, violated Section 2 by (1) refusing to sell power at wholesale to municipal power companies which competed with Otter Tail for retail sales of the power, and by (2) refusing to "wheel" electricity so as to let the municipal power companies buy at wholesale from others. The Supreme Court found that Otter Tail had violated Section 2 by this refusal to deal because it "sought to substitute for competition anticompetive uses of its dominant economic power." 410 U.S. at 380.

Kodak is engaged in the same type of business activity that *Otter Tail* found illegal. Kodak possesses admitted monopoly power over the tens of thousands of copier and micrographic equipment replacement parts it makes or has made. Plaintiffs cannot begin to afford to dupicate all of these parts, as they would be required to do in order to offer service if the parts are not available through Kodak. Kodak seeks to "substitute for [the existing] competition" in retail service of copier and micrographic equipment "anticompetitive uses of its dominant economic power" over plaintiff ISOs – i.e., to put the ISOs out of the business of competing with Kodak through its dominant economic power over parts. Kodak has not addressed,

and cannot overcome, the *Otter Tail* result and its exception to the blanket "refusal to deal" rule, recognized by *Colgate* and raised by plaintiffs in their opening brief.

In *Lorain Journal, supra,* the Supreme Court also found a violation of Section 2 of the Sherman Act. The Lorain Journal, a newspaper, was the only local business disseminating news and advertising in Lorain, Ohio. In order to eliminate its small competitor, a radio station established in a nearby community, the Lorain Journal refused to sell advertising to persons who also brought advertising from its electronic competitor. Kodak is engaging in exactly the same practices with regard to equipment owners who employ ISOs: it refuses to sell them parts. Such a unilateral refusal to deal is a violation of Section 2 of the Sherman Act under the exception noted in *Colgate*.

C. Pacific Coast Agricultural Export Assn. Requires The Finding Of A Section 2 Violation.

Likewise, Kodak has failed to address the Ninth Circuit case of *Pacific Coast Agricultural Export Assn. v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied* 425 U.S. 959 (1976), advanced by plaintiffs in their opening brief. There, Sunkist, with monopoly power over the wholesale supply of oranges, was found by the Ninth Circuit to violate Section 2 of the Sherman Act by its refusal to deal with plaintiff, to whom it had sold in the past, but who now competed with it for retail export of oranges to Hong Kong. Such a refusal to deal was found to violate Section 2 because "Sunkist's control of supply was employed to extend its monopoly into distribution."

526 F.2d at 1204. Kodak similarly, after initially selling copier and micrographics parts at wholesale to ISOs and others, has decided to extend its monopoly over parts into a monopoly over retail service to customers. Kodak has not mentioned *Pacific Coast Agricultural Export Assn.* because it cannot without conceding that its blanket "refusal to deal" rule does not control this case.

D. The Factors Considered In Aspen Dictate A Finding That Kodak's Actions Are Predatory.

In *Aspen, supra,* the Supreme Court considered another species of limitation on the "refusal to deal" rule when it considered the circumstances under which a firm with monopoly power has a duty to continue an existing joint-marketing arrangement with a smaller competitor. The Supreme Court found the defendant's refusal to deal in *Aspen* "a decision by a monopolist to make an important change in the character of the market," and, *coupled with* substantial impact on competitors and consumers as well as suspect business reasons given by the defendants, determined that defendants' actions were exclusionary. 472 U.S. at 604.

Kodak, by its refusal to sell parts to ISO competitors, when it *had* sold parts in the past, is, like *Aspen*, effecting "an important change in the character of the market" – it is eliminating ISOs nationwide and monopolizing a formerly competitive market for service. Like the *Aspen* Court, this Court should also place substantial weight on the adverse impact of Kodak's refusal to deal with its competitors (elimination of ISOs), on the "impact on consumers" (supracompetitive prices for service and lower

quality service), and on "whether [Kodak] has impaired competition in an unncessarily restrictive way" (rejection of sensitive pricing of parts as a means to recover investment). 472 U.S. at 605.

In attempting to distinguish *Aspen*, Kodak first trots out the old "interbrand competition" argument – that it "lacks market power in the copier and micrographics *equipment markets*." (K.R.B. at 38, emphasis supplied). This obviously misses the mark by far, since the product which Kodak refuses to sell (Kodak parts) and the service market it seeks to monopolize are the relevant markets, *not* the market for the new sales of Kodak equipment. In the cases relied on by plaintiff, the monopoly was measured by the markets for the product defendant refused to sell and the market sought to be monopolized: *Otter Tail* (local wholesale electric power market and power lines/retail power sales); *Pacific Coast Agricultural Export Assn.* (orange supply in Arizona and California/retail sales to Hong Kong), and *Aspen* (Aspen's ski lifts/Aspen area downhill skiing).

If Kodak prevails in its argument that wherever interbrand competition exists for one product, any second product or service associated with the first product (over which second product the company may have a monopoly or market power) may be illegally tied, or may be put to other "anticompetitive uses," then *Otter Tail, Pacific Coast Agricultural Export Assn.* and *Aspen* would have been decided differently.

Kodak attempts to misstate plaintiffs' position by asserting that "*Aspen* does not stand for a broad proposition that monopolists who choose to deal with their

competitors can never change their minds," and to isolate *Aspen* as an aberration based on strange facts, are to no avail. (K.R.B. at 38.) *Aspen* is another species of the *Otter Tail* principle that a monopolist does not have carte blanc to refuse to deal with a competitor in order to put that competitor out of business, *particularly where* there are existing dealings between them. Such prior dealings show *prima facie* that the monopolist had a business rationale to deal with its competitor in the first place and make suspect his subsequent refusal to deal. This was the case in *Otter Tail, Pacific Coast Agricultural Export Assn.*, and *Aspen*.

It was not the case in *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir. 1988), relied on by Kodak. In that case, plaintiff and defendant both bought propane from a third party, Chevron, and the issue was whether Pacific could be required to modify its refinery to permit production of propane for sale to plaintiff. In *Oahu* the Ninth Circuit found that Pacific's argument that modification of its refinery would be unprofitable was the legitimate reason for Pacific's refusal to do so, and that its refusal should not result in antitrust liability. Kodak not only is *not* being asked to modify its production of Kodak replacement parts for plaintiffs, it has supplied all such parts in the past (at a profit), and it will have to supply the same number of parts for all machines it sells whether it has a monopoly on service or whether it shares the service market with ISOs. Kodak does not and cannot make a claim that its sales of replacement parts are unprofitable as a business since it sells many such parts to ISOs at 100% more than to its own customers. In short, Kodak has not shown that its refusal to deal with

ISOs (as to which refusal there is substantial evidence of an exclusionary intent) was motivated by legitimate business reasons.

E. Kodak's Alleged "Business Reasons" For Its Parts Policy Change Are Shams and Do Not Prevail Over Its Predatory Intent And The Injury to Competition.

The burden on Kodak under these circumstances is a heavy one – to show the validity of new "business reasons" for its refusal to deal as a monopolist, and those reasons must outweigh the clearly anticompetitive intent. This burden is placed on Kodak because (1) there has been a course of dealings and prior sales to such competitors; (2) the new policy is "an important change in the character of the market"; (3) there is a substantial impact on service competitors; and (4) there is a substantial impact on service consumers. *Aspen*, 472 U.S. at 605.

Kodak proffers three basic reasons for the new and radical changes in its parts policies (Kodak's statement that "[n]either is there any evidence here that Kodak made a significant change in its policy" (K.R.B. at 41) is just plain untrue). Kodak claims the policy changes were motivated by: (1) "Promoting Interbrand Competition" (K.R.B. at 9); (2) "Reducing Inventories" (K.R.B. at 11); and (3) "Not Supporting Free Riding" (K.R.B. at 12). None of these reasons is valid.

Kodak's first argument is that the promotion of interbrand competition will be served by Kodak's actions, even though – or perhaps because – such actions would put all Kodak's service competitors out of business.

Kodak argues that a monopoly by Kodak would result in "[g]ood service" which "enhances Kodak's ability to sell equipment." (K.R.B. at 9.) This is a tenuous proposition at best. The fundamental tenets of free competition under the Sherman Act, expressed by the Supreme Court in *Northern Pacific, supra,* in fact negate such a proposition:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the *lowest prices, the highest quality* and the greatest material progress . . .

356 U.S. at 4 (Emphasis supplied.)

Competition for service of Kodak machines, not monopoly, will yield the lowest prices and the highest quality of service. Indeed, plaintiffs' evidence (A.O.B. at 7, 17) shows that ISO competitors both lowered the price and increased the quality of service for Kodak machines – as competition is supposed to do. The availability of high quality, low-cost service, not the requirement that service be bought from a monopolist, would best increase interbrand competition.

Kodak's second argument is that by refusing to sell replacement parts for Kodak equipment to ISOs (parts which only Kodak can supply), it would "reduce inventories" required for such parts. This argument is nonsensical. The total population of Kodak machines requires a certain number of replacement parts. If Kodak puts all ISO competitors out of business and establishes a 100% monopoly on service for this total population of

Kodak machines, it will have to supply the same number of parts that it now does – i.e., the parts for this total population of Kodak machines. The demand for Kodak replacement parts and the inventories to supply those parts will not vary if Kodak provides 100% of the service, or if Kodak shares that service with ISO competitors. Kodak will therefore not be able to reduce inventories at all, and in reality probably does not intend to.

The real rationale for Kodak's cutting off of ISOs' parts is its pique at ISOs competing with it for service and taking away Kodak service customers. It determined to do everything in is power not to help them, and to put them out of business:

> Kodak management felt it made no sense to subsidize the efforts of these firms by manufacturing or purchasing and, at Kodak's expense, maintaining inventories of parts for their use.

(K.R.B. at 12.)

This admission forms the basis for Kodak's third argument that "Kodak does not want to help the ISOs take away service revenues from Kodak." Kodak argues that to require it to sell replacement parts to ISOs would sustain or create "free riders". Yet Kodak utterly fails to explain why ISOs – who often pay twice as much for parts as some of Kodak's other customers – are "free riding," except for the lame assertion that it has some sort of "birth right" to monopolize service stemming from its investment in the manufacture of equipment. The so-called "free rider" authority Kodak cites (K.R.B. at 37) not only has no application here, it has been badly perverted by Kodak. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), primarily relied upon by Kodak, the

Supreme Court dealt solely with the distribution of new T.V. sets manufactured by Sylvania. The sale of service and parts was not even at issue in *Sylvania*, only the sale of the new equipment. In fact, the so-called "free rider" effect in *Sylvania* referred to the situation where some distributors of the new T.V. sets *refused to provide service* and repair facilities for such equipment and merely sold the equipment, avoiding any responsibility or costs downstream for its repair. 433 U.S. at 55. The case at bar obviously presents no such situation whatsoever. *Sylvania* and its progeny do not require ISOs, in order to compete with Kodak on service, to first manufacture the equipment they repair.

Kodak's three alleged "business reasons" are shams. They are clearly designed to try to cloak Kodak's predatory and exclusionary conduct, in violation of Section 2 of the Sherman Act, as reasonable and competitive conduct. The reasons proffered by Kodak fall far short of the business reasons accepted in *Oahu* (that a manufacturer cannot be forced to *begin unprofitable production* to supply a competitor) or in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986) (that Western Union cound not be forced *to supply a competitor with its sales force* when the competitor could easily supply itself). In fact, in *Oahu*, plaintiff Oahu was able to and did obtain its propane from an alternate source, Chevron, to compete with Pacific Resources. In *Olympia Equipment* other competitors were able to establish their own sales forces and were able to remain in competition without Western Union's assistance. The undisputed evidence here is that plaintiff ISOs cannot manufacture the tens of

thousands of Kodak replacement parts necessary to stay in competition with Kodak.

The Ninth Circuit's language in *Oahu* that the "affirmative duties" of a monopolist to aid its competition are not absolute and "arise only when there is no justification for refusing aid to a competitor" must be read in light of the principles of *Otter Tail, Aspen* and *Pacific Coast Agricultural Export Assn.* It is clear that a number of factual issues go into determining whether the refusal to deal of a monopolist is primarily exclusionary – designed to achieve a monopoly at another level of distribution – or is justified by *legitimate* and not sham business reasons. The determining factor is not, as Kodak suggests, whether there is some business reason proffered by the defendant, but whether, on balance, the exclusionary reasons or the proffered business reasons predominate.

In *Aspen*, the Supreme Court in concluding that the action there was predominately exclusionary, considered: (1) the prior willingness of the defendant to deal; (2) its course of dealings with plaintiff; (3) whether the change by defendant was an important change in the character of the market; (4) the impact on competitors; (5) the impact on consumers; and (6) whether the actions were unnecessarily restrictive of competition, *as well as* whether there were independently valid business reasons for Aspen's refusal to deal. On each of these points Kodak, as a monopolist in Kodak replacement parts, has failed to show that its refusal to deal with ISOs was not predominately exclusionary and illegal under Section 2 of the Sherman Act, as construed in *Otter Tail, Lorain Journal, Aspen* and *Pacific Coast Agricultural Export Assn.*

CONCLUSION

For the foregoing reasons, and those set out in Appellants' Opening Brief, the summary judgment of the district court should be reversed, and this case should be remanded with instructions to make findings that plaintiffs have established, or have at least raised triable issues of material fact with regard to: (1) the elements of *per se* tying arrangements in violation of Section 1 of the Sherman Act; and (2) the elements of a monopolist's predatory refusal to deal with competitors in violation of Section 2 of the Sherman Act.

Dated: November 29, 1988

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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IMAGE TECHNICAL SERVICES, INC., et al.,
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v.
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Appeal from the United States District
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Honorable William W. Schwarzer
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PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING *EN BANC*

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INTRODUCTION

No other court has ever held that a vertically integrated equipment manufacturer which faces active competition from other manufacturers may violate the antitrust laws *per se* by not selling repair parts to aftermarket competitors unwilling to develop their own parts supply sources. All prior decisions, including those of this Court, recognize that as a matter of irrefutable economic principle, it is impossible to exercise market power in a derivative aftermarket without market power in the primary interbrand equipment market. As Judge Wallace's dissent shows, imposing a duty to sell parts would protect competitors, not competition.

The majority opinion expressly acknowledges both the logic of this principle and the fact, conceded by appellants, that Kodak has no market power in either of the interbrand equipment markets relevant to this case. Opinion at 3637, 3643. However, the majority then proceeds to ignore the principle. Relying on the possibility that unidentified "market imperfections" and unknown "other factors" might somehow suspend this principle, it reverses summary judgment. *Id.* at 3635, 3637.

The majority's opinion raises at least two fundamental issues, one of procedure and one of substance. Procedurally, the majority misperceives the role of economic analysis in ruling upon summary judgment motions in antitrust cases. The Supreme Court squarely held in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), that "if the claim is one that simply makes no economic sense," plaintiff's burden to survive summary judgment increases. This Court has consistently followed that rule. Yet the majority. after acknowledging that it was *Kodak's defense* that made economic sense, reversed summary judgment based on the unsupported — and certainly unexplained-possibility that theory might not mirror reality. Opinion at 3636, 3643. This major change in the Court's approach to summary judgment warrants rehearing.

Substantively, the majority's opinion has profound and distinctly anticompetitive effects. By making the large investments of money, talent and energy required to compete in the interbrand markets for copiers and micrographics equipment, Kodak has undeniably enhanced competition. Antitrust policy should and always has encouraged such investments. And because no one disputes that Kodak faces fierce competition and lacks market power, there is no danger that Kodak could act in a way that would harm consumers.

Accordingly, imposing a duty on Kodak to support aftermarket service competition against itself cannot be justified on the ground that it protects consumers from Kodak. Rather, imposing such a duty *penalizes* Kodak for having made the investments which created the "Kodak service" aftermarket in the first place. It says to Kodak,

and by extension to all equipment manufacturers, that developing a successful product carries an antitrust penalty. That is a rule that is anti-investment, anti-innovation and ultimately anticompetitive. Small wonder that until now, no court has ever embraced it.

Kodak petitions the Court for rehearing and, alternatively, suggests a rehearing *en banc*. In counsel's judgment, rehearing is required since the majority opinion overlooks and misapprehends key points of fact and law. Federal Rule of Appellate Procedure 40. Those specific points, discussed below, are overlooking the *Matsushita* standard for summary judgment, misreading *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 n. 24 (1984), failing to follow precedents relying on the economic principle presented by Kodak, failing to describe any alternative economic analysis, overlooking this Court's prior decisions that unilateral refusals to sell parts are lawful, and ignoring unrefuted evidence that there are no entry barriers to any potential parts market, that parts are not an essential facility and that Kodak's high quality service justification is genuine, Kodak requests rehearing to affirm the judgment below in favor of Kodak on the *per se* tying and monopolization claims.

I. THE PER SE TYING CLAIM

A. There Is No Genuine Issue Regarding Kodak's Lack Of Market Power In The Market For Parts.

Appellants concede (and the majority opinion agrees) that there is fierce competition in the interbrand markets for copiers and micrographics equipment and that Kodak lacks any ability to restrain competition in the interbrand

markets. A.O.B. at 44-45; A.R.B. at 11-13; Opinion at 3634. With that concession, as Judge Wallace demonstrates, the "economic logic of Kodak's position [cannot] be overcome." Dissent at 3647. Kodak can neither leverage power into aftermarkets, nor use any power it somehow may have in the aftermarkets without compromising its interbrand market position.[1] That logic disposes of the *per se* tying claim as a matter of law.

1. Unknown "market imperfections" cannot support a per se tying claim.

The majority misapprehends this market power issue. It concedes, as it must, that a tying arrangement is unlawful only if there is market power in the tying product market (here, in the majority's formulation, a "Kodak parts market"). Opinion at 3631, 3633. And it concedes that, in principle, Kodak should not have the required market power given its lack of market power in the interbrand equipment market. *Id.* at 3634. But then the majority brushes aside this principle with an approach that even appellants did not propose.[2] It suggests that

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[1] The Kodak brand parts and service aftermarkets are not separate from the interbrand market; nor does Kodak concede that its practices constitute a tying arrangement. Appellee's Brief at 26-29.

[2] Appellants never explain, theoretically or factually, how the economic principle could be otherwise. Instead, in reliance on the much criticized *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1339 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985), they argue that although Kodak's theory works for new customers, it may not for owners of older equipment who are "locked-in." A.R.B. at 12-13. *Digidyne* does not support appellants. *See* Appellee's Brief at 32-34.

"market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id.* at 3635-36, *citing Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 n. 24 (1984). The majority opinion never identifies any such imperfections, and thus the possibility that they exist should not suffice to overcome summary judgment. *See Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987) (Kennedy. J.) ("It is the record made on summary judgment that controls, not that record plus speculative inferences. . . . ").

Worse, however, the majority completely misreads *Jefferson Parish*. *Jefferson Parish* holds that market imperfections do *not* suffice to prove tying market power: "While these factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying." 466 U.S. at 26-27 (footnote omitted). Therefore, even if the majority could identify specific imperfections in the copier and micrographics equipment markets (as was done in *Jefferson Parish*, at 27), they could not be the basis for a finding of tying market power.

To bootstrap lack of market power into market power, the majority next formulates an illogical equation: "Some strength in the interbrand market, although short of actual market power, can combine with other factors to yield power in an after-market." Opinion at 3637. In algebraic form, the majority's formula is:

LESS THAN MARKET POWER + UNKNOWN FACTORS = MARKET POWER

That formula is fatally flawed. No court has ever before suggested that something less than market power will

suffice to establish a *per se* tying claim. No court has ever before suggested that some unidentified factor can turn lack of market power into market power. Indeed, the very authority cited by the majority, *Jefferson Parish*, explicitly holds that market power is required and that even identified "market imperfections" do not eliminate the requirement for market power. 466 U.S. at 27. This Court has always adhered to that rule. *E.g. Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1345 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 179 (1988). The majority opinion errs by misreading *Jefferson Parish* and by expressly lowering the standard required to prove an unlawful tying arrangement.

Since "market imperfections" are not enough to make up for lack of market power, the majority's citation to evidence of events in the assumed aftermarket (opinion at 3636) is also unavailing. First, the majority's evidence does not support a finding of market power and is, in fact, consistent with Kodak's position. As Judge Wallace notes, that evidence is entirely consistent with the concept that Kodak can only charge supracompetitive prices for services in the suicidal short run and at risk of losing its position in the far more important interbrand market. Dissent at 3645-46. It is also consistent with the concept that freeriding ISOs who do not bear the costs of establishing and maintaining parts inventories may be able to outbid those, like Kodak, who make the investment.

Second, the evidence mustered by appellants is inadmissible, isolated and incidental at best.[3] It is not

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[3] The majority first cites evidence that Kodak charges up to twice as much for inferior service. Opinion at 3636. The

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evidence that overcomes either the economic principle that competition in the interbrand markets controls or the fact that Kodak's activities have enhanced interbrand competition.

2. The majority opinion is inconsistent with Matsushita.

The shortcomings of appellants' evidence are made even clearer by contrasting this case to *Matsushita*. *Matsushita* held that plaintiffs who present claims that make "no economic sense" must meet strict evidentiary

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actual "evidence is" an unauthenticated Kodak document which recites only hearsay statements from a third party about pricing and concludes that Kodak has the "best service organization" for which customers are "sure[ly]" willing to pay a "premium." Record, No. 41, Hennefer Decl. Ex. L (p. 59 of appellants excerpts). Next the majority cites evidence that competition from ISOs in some instances drove down Kodak's service price. But appellants cited no such evidence in their briefs. The record shows only hearsay references to two offers by Kodak to lower prices. Record, No. 40, Arnold Decl. ¶¶ 26, 30. Finally, the majority cites evidence that some owners of large Kodak equipment may pay higher prices for Kodak service rather that switch to a competitor's equipment. That "evidence" consists of conclusory, hearsay statements in appellants' declarations to the effect that some owners of older micrographics equipment are "locked in." *See* Hernandez Decl. ¶¶ 40-47, Welch Decl. ¶ 17; Kastner Decl. ¶¶ 5-8. But, regardless of appellants' lock-in theory, this evidence is limited to older micrographics equipment and, as appellants concede, Kodak continues to sell parts to ISOs for older micrographics equipment.

standards to overcome summary judgment.[4] 475 U.S. at 587. The Supreme Court rejected evidence that was far more substantial than the evidence here.

The *Matsushita* Court rejected an expert's opinion that the alleged conspirators had depressed prices in the United States and sold goods at substantial losses. 475 U.S. at 594 n. 19, 600-03. The Supreme Court found that the expert's evidence of below-cost pricing had "little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational." *Id.* at 594 n. 19. The dissent in *Matsushita* claimed that "[n]o doubt the Court prefers its own economic theorizing" to

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[4] The majority opinion finds "logical appeal" in the economic principle cited by Kodak, but "cannot say that this theory mirrors reality." Opinion at 3634. In contrast, the Supreme Court in *Matsushita* found that economic principles are not just theories; they are "economic realities" -- sufficient to support summary judgment and overcome some contrary evidence. 475 U.S. at 594-95, n. 19. Economics do matter in antitrust cases. As this Court stated last Wednesday, "like all antitrust cases, this one must make economic sense." *U.S. v. Syufy Enterprises*, 1990 U.S. App. Lexis 7396 at 6-7 (9th Cir., No. 89-15475, May 9, 1990). *See also Atlantic Richfield Co. v. USA Petroleum Co.*, 1990 U.S. Lexis 2543 (Supreme Court. No. 88-1668. May 14, 1990) (reversing divided decision of this Court in context of Section 1 summary judgment); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723-31, 735-36 (1988) ("[R]esting [its] decision upon the foregoing economic analysis"); *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1156-57 (9th Cir. 1988) (Recent Supreme Court decisions "reflect a more sophisticated use of economic analysis in antitrust cases than has previously been seen. [Citation omitted.] In line with this economic awareness, a court should be less concerned with subjective notions of motive and more concerned with the economic effect of challenged conduct.")

the expert's analysis (*id.* at 603), but the majority in *Matsushita* recognized that its economic theories were "economic realities" and so controlled. *Id.* at 595.

In this case there is no expert analysis. There is no competing economic theory. The isolated evidence cited by the majority does not support the inferences drawn from it. That evidence is certainly insufficient to rebut the conceded economic logic based on facts that are also conceded. As in *Matsushita*, where the Supreme Court relied on economic logic to support summary judgment and to reject contrary evidence and expert opinion, economics should control the outcome here. Since, as a matter of economic reality, Kodak necessarily cannot have market power in the derivative market for parts, appellants' *per se* tying claim fails.

3. The majority's opinion conflicts with the controlling authorities of this Court and other courts of appeals.

This and other courts have repeatedly found that interbrand equipment competition prevents a finding of market power in a derivative aftermarket. The majority fails to distinguish those cases, even the three on which Kodak relied most: *General Business Systems v. North American Philips Co.*, 699 F.2d 965, 977 (9th Cir. 1983); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794 (1st Cir. 1988) and *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 234-37 (7th Cir. 1989) (Posner. J., dissenting).

The majority says that plaintiffs in *General Business Systems* presented no facts from which market power in

the computer market could be inferred.[5] Opinion at 3636. That certainly does not distinguish it from this case. Here, appellants concede the same thing. Opinion at 3634 n. 3 ("Appellants do not dispute Kodak's assertion that it lacks market power in the interbrand markets.") And as Judge Wallace notes, once that is conceded market share has no significance. Dissent at 3647. Moreover, the majority misreads *General Business Systems*. There was substantial evidence that the tied product in that case, magnetic ledger cards ("mlcs"), was priced supracompetitively and that mlcs constituted a separate market. 699 F.2d at 973. But the "primary" point was that, despite that evidence, "Philips had little or no power to raise the price of its mlcs without reducing its profits because any such increase would diminish sales of its computer system . . . ." *Id.* at 972. If anything, summary judgment in this case follows *a fortiori* from General Business Systems.

The majority tries to distinguish *Grappone* by saying "Kodak has tied parts to service, not equipment to parts." Opinion at 3634. That is a distinction without a difference. Both the parts market and the service market (if they are separate) are derivative of the equipment market. If, as the majority suggests, power cannot be transferred from the equipment to the derivative parts market, then power cannot be transferred to the derivative service market. Thus, just as competition in the primary

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[5] The majority also says that there is no evidence that Philips was the exclusive source of the tying product, service for its computers. Opinion at 3636-37. The lack of evidence regarding the uniqueness of Philips' service played no role in the Court's determination that the aftermarket for mlcs could not be separated from the interbrand market. 699 F.2d at 972.

interbrand market prevents Subaru from charging supracompetitive prices for parts (*Grappone*, 858 F.2d at 798), it prevents Kodak from charging higher prices for service.

As to Judge Posner's dissent in *Parts and Electric Motors*, the majority only contrasts the relative strengths of Kodak's and Sterling's shares in the interbrand markets. Opinion at 3637. But again the controlling issue, no market power in the primary market, is conceded. As Judge Wallace states, given that concession, it makes no difference what defendant's market share is. Dissent at 3647. The principle that Judge Posner explained and Judge Wallace followed still holds: Kodak cannot, in any non-trivial sense, exercise market power in an aftermarket. 866 F.2d at 236; Dissent at 3646.

B. Kodak's Practices Are Unilateral Refusals To Deal.

The centerpiece of Kodak's position before this Court was that its practices fit a long line of cases holding that a manufacturer's unilateral refusal to sell replacement parts does not violate the antitrust laws. *Bushie v. Stenocord Corp.*, 460 F.2d 116, 120 (9th Cir. 1972): *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1337-38 (9th Cir. 1983): *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987). Prior to the majority opinion here, every court that reviewed a manufacturer's unilateral refusal to sell parts found it to be legal.

In discussing the tying claim, the majority overlooks Kodak's position and does not discuss these cases. It simply notes that Kodak did not act unilaterally since it

entered into "agreements" with its equipment owners that they could buy parts without service only if they were self-servicers. Opinion at 3639. The majority relies exclusively on Kodak "Terms of Sale" that contain an introductory statement that "[p]arts are stocked to meet the repair needs of . . . other users . . . who service only their own Kodak equipment." Record, No. 40, Hernandez Decl. Ex. C, p. 1 (p. 39 of appellants' excerpts). The majority misapprehends both the law and the evidence.

First, all of the above-cited cases involved the same kind of "agreements" between a manufacturer and its customers.[6] Nevertheless, all held that such vertical arrangements do not constitute unlawful concerted actions under the antitrust laws.

Second, the purported restriction adds nothing to appellants' claim, Kodak's practices are intended to limit sales of parts to ISOs only.[7] Presumably the majority has

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[6] *Bushie*, 460 F.2d at 120 ("[T]he effect of the agreement [between Stenocord and former Bushie employee] was to eliminate Bushie as a Stenocord dealer [who had been selling and servicing Stenocord dictating equipment]."); *Calculators Hawaii*, 724 F.2d at 1334 ("[A]greement between Brandt and Hallett . . . prevented Calculators, an office equipment distributor, from obtaining Brandt equipment or repair parts."); *Dimidowich*, 803 F.2d at 1475 (Bell & Howell "does not sell parts for resale *or for use* by independent companies that service and repair B & H equipment." (Emphasis added)).

[7] The record in this case is undisputed that Kodak's purported restriction has had no significant effect. As quoted by appellants. Kodak acknowledges that it "has no effective means to prevent direct equipment customers from purchasing parts, ostensibly to perform their own service, when in fact

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no problem with that practice as applied directly to ISOs, but seizes on the purported restriction on sales to others not to have ISO's install those parts. *See* Opinion at 3632 (relying on second half of *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1. 5-6 (1958) test). But attempting not to sell parts to ISOs indirectly is no more anticompetitive than the direct refusals to sell parts which have been found to be legal. Kodak has an unquestioned right to refuse unilaterally to sell parts to ISOs. That right should not be undercut by references to "agreements" that are nothing more than restatements of an intention to refuse to deal.

C. A Desire Not To Help ISOs May Justify Kodak's Practices.

One of the business justifications cited by Kodak in support of its practices was the desire not to help ISOs compete against it and take away service revenues. The majority opinion incorrectly holds, as a matter of law, that Kodak's desire not to support freeriding cannot be a valid business justification. Opinion at 3639.

This holding is based on the conclusion that Kodak's practices "create[] an entry barrier by requiring [ISOs] to

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they have an ISO service their equipment." A.O.B. at 23. Appellants admit that Kodak's restrictions are ineffective since it sells parts to "total strangers to Kodak with no association to micrographics machines at all (such as the 'China Hutch,' an English China Shop, or to non-existent individuals such as 'Remy Corgi,' a person's dog)." A.O.B. at 12. There is no reason to penalize Kodak for a practice that has no real effect.

enter two product markets simultaneously." *Id.* To the contrary, and as the majority notes elsewhere, Kodak denies that parts and service are separate markets. Opinion at 3632. Since the majority found the question of two markets to be "a disputed issue of fact." it cannot resolve the question against Kodak as a matter of law.[8]

Further, even if parts and service are separate markets, the majority cannot conclusively presume — as its "matter of law" holding does — that this alleged tying arrangement creates barriers to entry. Tying arrangements create entry barriers, if at all, only to the extent that such barriers exist in the *tying* product market.[9] This is the essence of *U.S. Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 617-18 (1977), where a prefabricated homes-to-credit tie was held not to be unlawful because the defendant lacked any cost advantage over its competitors in the tying product (credit) market. It was also recognized in Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 505 n. 2 (1969), where the Court stated that tying is

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[8] The correct analysis recognizes that parts are required to perform service, and are thus a necessary investment for any participant in any alleged service market. Kodak has made that investment; the ISOs decline to do so, and instead demand that Kodak supply their parts so that they can take service revenues away from Kodak. That is anticompetitive freeriding.

[9] *See Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 (7th Cir. 1985), *cert denied*, 475 U.S. 1129 (1986) ("If rivals may design and offer a similar package for a similar cost, there is no barrier, and without a barrier there is no market power."); *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407, 1420 (11th Cir. 1987); *Spartan Grain & Mill Co. v. Ayers*, 735 F.2d 1284, 1288 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985).

unlawful "only when other competitors are in some way prevented from offering the [tying] product themselves."

Here, there is no evidence of barriers in the tying product market -- specifically, no evidence that appellants cannot manufacture or procure from independent manufacturers parts they could use to provide service on Kodak machines. Indeed, there is no evidence that appellants even tried to obtain parts from other sources. At most, appellants claim they cannot buy them from Kodak's own OEM suppliers. A.O.B. at 14. But their "evidence" was limited to hearsay statements that some parts could be obtained elsewhere at lower prices (*e.g.*, Record. No. 40. Damiani Decl. ¶ 21, Kastner Decl. ¶ 13), some at higher prices (*e.g., Id.*, Searle Decl. ¶ 16), and others could not be obtained since they were "proprietary" (*e.g., Id.*, Hernandez Decl. Ex. D; No. 41, Hennefer Decl. Ex. L, Doc. No. 2919) or they were made for Kodak (*e.g.*, Record, No. 40, Searle Decl. ¶ 15).

Other, competent evidence supports the conclusion that parts are available from other sources. For example, appellants claim that 90% of the replacement parts for Kodak equipment are made outside Kodak, but they have no admissible evidence that they cannot obtain those parts. A.O.B. at 15. Appellants also claim that two year old copiers have a value of $2500, less than 4% of what they cost new. *Id.* at 10. Cannibalizing those cheap used machines is an obvious source of inexpensive parts. Finally, appellants offered no evidence that they could not manufacture the parts themselves. Entry into the far more complex equipment markets has been achieved by many competitors in recent years.

The critical question is whether appellants can find parts elsewhere. On that issue they have presented no evidence at all. Without such evidence, there is no basis for rejecting Kodak's freeriding argument, much less as a matter of law.

II. THE MONOPOLIZATION CLAIM

A. The Majority Misapprehends the Aspen Exception.

The majority agrees with the district court's statement that "Kodak had no duty to deal with its competitors." Opinion at 3641. But it relies on the unique exception created in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985), to reach a contrary result.[10]

The majority's reading of the exception swallows the rule. It certainly goes beyond this Court's reading of

[10] The majority agrees that appellants did not raise this argument in their brief below, but it is "not confident enough" that the district court somehow did not think of and consider appellants' new argument. Opinion at 3640 n. 7. The majority's consideration of this new argument, on that ground, overrides long-standing rules in this Circuit. Before now, the Court had discretion to hear new arguments in three exceptional situations, none of which applies. *See Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir. 1985) (new argument not considered where analysis required detailed factual inquiry and relevant facts might not have been presented below); *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 790 F.2d 1421, 1426 (9th Cir. 1986) (no consideration of argument where, as here, it was not discussed in opposition papers below and entire thrust below was different).

Aspen in *Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 368 (9th Cir.), *cert. denied*, 109 S.Ct. 180 (1988).[11] The majority would require Kodak, absent a legitimate business justification, to sell parts to ISOs on the theory that those parts are an "essential" facility. Opinion at 3641. That theory necessarily, but inaccurately, assumes that appellants have no alternative parts supplies.

Appellants bear the burden of proving the parts are unavailable and that competition is harmed by Kodak's refusal to sell them to ISOs. As the Second Circuit recently found, "the word 'essential' indicates [that] a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible." *Twin Laboratories, Inc. v. Weider Health & Fitness*, 1990 U.S. App. Lexis 5466 at 11 (2d Cir., No. 89-7972, April 9, 1990) (affirming summary judgment on essential facilities and attempted monopolization claims). Here, there is no evidence that Kodak is the only feasible source of parts. *See* pp. 11-12, above.

The majority overlooks this defect in appellants' evidence. Since the undisputed evidence is that Kodak is not an essential facility for parts, the monopolization claim fails.

[11] *See also U.S. v. Syufy Enterprises*, 1990 U.S. App. Lexis 7396 at 6-7 (9th Cir., No. 89-15475, May 9, 1990) ("[U]ltimately the court must resolve a practical question in every monopolization case: Is this the type of situation where market forces are likely to cure the perceived problem within a reasonable period of time?")

B. There Is No Genuine Issue Regarding Kodak's Lack Of Monopoly Power.

The majority agrees that, to be held liable for monopolization, Kodak must "possess monopoly power in the relevant market" and that monopoly power "is something more than the market power that is a prerequisite to liability under section 1." Opinion at 3640, 3643. The majority states that the issue of monopoly power is "not as easily answered" as the issue of market power, but concludes that economic "theory" once again *might* not "mirror" economic "reality." *Id.* at 3643.

For the same reasons that the majority misapprehends the significance of Kodak's economic logic concerning the Section 1 issue of market power, the majority *a fortiori* misapprehends appellants' failure to raise any genuine issue of fact regarding Kodak's lack of monopoly power. Indeed, the majority compounds the error of its Section 1 formula. It necessarily concludes that:

LESS THAN MARKET POWER + UNKNOWN FACTORS = MONOPOLY POWER

But that conclusion flies in the face of all existing law, economic logic and common sense.

C. There Is No Genuine Issue Regarding Kodak's High Quality Service Business Justification.

Kodak presented detailed evidence of a strategy based on the marketing of high quality service and its need to maintain responsibility for service. Appellee's Brief at 9-11. *See* Record, No. 14, Murray Decl. ¶¶ 13, 18, 19, 22, 26, 30, Exs. 3, 4, 5; No. 15, Lacy Decl. ¶ 11, 12, 19,

20, 25, 27, Exs. 2, 3. That evidence was never disputed by appellants. Therefore, the Section 2 claim should have been dismissed. *Mozart*, 833 F.2d at 1350-52.

The majority states that there is an issue of fact as to whether Kodak's desire to maintain high quality service is "genuine rather than pretextual." Opinion at 3642. But the evidence it cites is only an example of a refusal to sell parts following an ISO's winning of service contracts. *See Id.* at 3638. That example says nothing about Kodak's desire to maintain high quality service. Appellants have never disputed that Kodak has such a desire and that the desire makes sense. Since the evidence about the service justification is unchallenged, there is no basis for a trier of fact to conclude that the justification was not genuine. As *Mozart* held and Judge Wallace concludes, that is true regardless of the existence of other evidence of anticompetitive intent. Dissent at 3650. *See also Oahu Gas Service*, 838 F.2d at 368-69.

SUGGESTION FOR REHEARING EN BANC

Kodak suggests rehearing of this matter *en banc*, under FRAP 35(a), to secure and maintain uniformity of the Court's decisions, and under Circuit Rule 35-1, in light of a direct conflict with other courts of appeal with respect to a rule of national application in which there is an overriding need for national uniformity. Every manufacturer of high technology systems faces the same antitrust penalty if the majority opinion stands. *See, e.g*, amici brief of Hewlett-Packard, Digital, Data General and Wang. In addition, another pending appeal, *Datagate, Inc. v. Hewlett-Packard Co.*, No. 88-15293, raises the same

issues and submission in that case has been withdrawn pending the decision in this matter. Order, November 22, 1989 (copy attached).

CONCLUSION

For the reasons stated above, Kodak respectfully requests that the Court grant a rehearing or that the matter be heard *en banc*. Dated: May 15, 1990.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 88-2686

IMAGE TECHNICAL SERVICES, INC., et al.,

Plaintiffs-Appellants,

v.

EASTMAN-KODAK COMPANY,

Defendant-Appellee.

APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C-87-1686-WWS

BRIEF *AMICUS CURIAE OF* DIGITAL EQUIPMENT CORPORATION, HEWLETT-PACKARD COMPANY AND WANG LABORATORIES INC. IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

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No. 88-2686: Image Technical Services, Inc., et al., Plaintiffs-Appellants, v. Eastman Kodak Co., Defendant-Appellee

Certificate Required by Circuit Rule 28-2.1

Pursuant to Ninth Circuit Rule 28-2.1, the undersigned counsel of record for *amicus curiae* Digital Equipment Corporation, Hewlett-Packard Company and Wang Laboratories Inc. certifies that there are no known interested parties other than those participating in the case.

This representation is made to enable judges of the court to evaluate possible recusal.

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Interest of Amicus Curiae

Digital Equipment Corporation, Hewlett-Packard Company and Wang Laboratories Inc. (collectively, "amici") compete with each other and many other firms in the business of supplying computer system solutions for a multitude of data processing requirements. These firms vie to supply the highest-performance, lowest-cost combinations of hardware, software and service to meet the demands of buyers adept at comparing the overall performance and cost of owning these systems. The quality and price of post-sale service are critical to the competitiveness of each firm's systems. No firm has the power or incentive to take advantage of its system users by lowering the quality or raising the price of such service; any firm attempting to do so would quickly lose system sales and place at risk its entire systems business. Computer users have greatly benefited from the explosive rate of technological change and the resulting decline in the cost of computing power fostered by intense systems competition.

The computer industry shares these essential characteristics with the copier and micrographic equipment industries involved in this case. These realities of the computer and similar industries are at the heart of numerous precedents in this Circuit and elsewhere rejecting attempts by antitrust plaintiffs to label any one firm in the industry as a "monopolist" in or as having "market power" over a "market" limited to one isolated part of that firm's overall systems business. Under these precedents, the service of a single manufacturer's equipment *cannot* be a relevant antitrust market because of the inextricable relationship between such service and the overriding fact of interbrand equipment competition.

The majority opinion misapplies these controlling precedents. The result, if allowed to stand, could permit a jury to find that Kodak possesses market or indeed monopoly power over the service of Kodak equipment notwithstanding plaintiffs' admission that Kodak lacks interbrand market power. Such a result makes no economic sense and thus cannot make antitrust sense. Whatever impact Kodak's parts policies might have had on independent service *competitors*, those policies could not have adversely affected *competition* absent Kodak's possession of market power in the interbrand equipment business. The misapplication of market definition and market power principles in this case could actually impair competition by restraining the freedom of equipment manufacturers to innovate with regard to their service operations so as to enhance the overall competitiveness of their equipment.

Amici have faced similarly groundless antitrust charges in this Circuit and elsewhere in connection with

their service businesses. We thus have an interest in the correct application of market definition and market power principles to our high technology industry, so as to preserve our ability to compete vigorously for system sales.

Reasons for Granting the Petition and Suggestion

1. Inconsistency With General Business Systems

The majority opinion cannot be squared with this Court's decision in *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983).[1] This Court there held that, *as a matter of law*, competition in the interbrand market (for small business computer systems) precluded the exercise of market power over parts or service for such systems. *Id.* at 972-75. At the outset of its discussion, this Court observed that the "district court rejected as a matter of law" plaintiff's market definition (limited to magnetic ledger cards ("mlcs") used in defendant's computer systems) and stated that "[i]t is this interpretation of the law that we must review." *Id.* at 972. This Court agreed with the district court that defendant's undisputed lack of market power in the interbrand market compelled the conclusion "that the market for mlcs cannot be separated from the general market for small

[1] Because the majority opinion irreconcilably conflicts with *General Business Systems, en banc* review is both appropriate and necessary. *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987); *Charleston v. United States*, 444 F.2d 504, 506 (9th Cir.), *cert. denied*, 404 U.S. 916 (1971).

business computer systems" and that, accordingly, defendant lacked market power over those mlcs. *Id.*[2]

In short, the *dispositive* fact in *General Business Systems* was defendant's lack of market power in the interbrand market. Similarly, here, it was undisputed that Kodak lacks interbrand market power. 90 C.D.O.S. 3625, 3634 n.3 (hereafter, "Op. at ___"). Under *General Business Systems*, that undisputed fact is dispositive because, as a matter of law, interbrand competition prevents the exercise of market power in any hypothetical intrabrand market for parts or service. The district court thus properly entered summary judgment and did *not* err by denying plaintiffs additional discovery; such discovery could not have yielded evidence sufficient to create a triable issue where plaintiffs did not dispute Kodak's lack of interbrand market power.

The majority's effort to distinguish *General Business Systems* by alluding to alleged factual differences between the two cases is unavailing. The majority cited "evidence"[3] that (a) "Kodak charges up to twice as much as

[2] Thus the Court agreed (699 F.2d at 972) with the district court that

> Philips had little or no power to raise the price of its mlcs without reducing its profits because any such increase would diminish sales of its computer system and very likely adversely affect aggregate profits. Were mlc prices significantly increased, computer system buyers quickly could shift to other sellers who, in turn, could profitably expand their output to meet the new demand.

[3] We understand that such evidence consists in its entirety of multiple hearsay statements that would not be admissible

(Continued on following page)

appellants for service that is of lower quality"; (b) "in some instances competition from ISOs drove down the price that Kodak was willing to charge for service"; and (c) "in other instances some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors, systems." Op. at 3636.

Such evidence fails to raise a triable issue. Higher prices for Kodak service *could* be suggestive of market power "under proper circumstances," *General Business Systems*, 699 F.2d at 977, but no such circumstances exist in *this* case.[4] To the contrary, the evidence indicated that differences in prices reflected differences in costs, such as Kodak's maintenance of a $16 million parts inventory that was maintained substantially for the benefit of ISOs, which were thereby subsidized by Kodak's investment

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(Continued from previous page)

under Fed. R. Evid. 802-04. *See* Record, No. 40, Hernandez Dec. Such evidence does not create a triable issue, because a party opposing summary judgment must "set forth such facts as would be admissible in evidence." Fed. R. Civ. P. 56(e).

[4] As this Court made clear just last week, in an opinion joined by Judge Wiggins, one such circumstance that is not only proper but *essential* to any inference of market power is a showing of "significant barriers to entry"; absent that circumstance, "any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less." *United States v. Syufy Enterprises*, 90 C.D.O.S. 3194, 3196 (9th Cir. May 9, 1990). There is no basis for finding any such barriers protecting Kodak's ability to *maintain* higher prices; absent such barriers, the mere fact that Kodak might have been charging higher prices at some point in time cannot suffice to create a genuine issue as to its market power.

and could thereby avoid this cost.[5] Plaintiffs presented *no* evidence supporting their assertion that Kodak's higher prices resulted from the exercise of market power. Conduct as consistent with lawful competition as with unlawful competition does not, standing alone, create a triable issue. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

The possibility that Kodak charged more than ISOs at one point in time does not mean that it has the power to sustain higher prices over a period of time long enough to permit a trier of fact reasonably to conclude that it has market power. *See Syufy*, 90 C.D.O.S. at 3196-97 ("[i]n evaluating monopoly power it is not market share that counts, but the ability to *maintain* market share" (emphasis by the Court)). Indeed, as the majority found, in the short run, "competition from ISOs drove down the price that Kodak was willing to charge for service" (Op. at 3636), thus suggesting that Kodak lacks the power to sustain higher prices.[6] Over the long run, as this Court held with respect to the tying claim in *General Business Systems*, 699 F.2d at 977, interbrand competition forecloses Kodak from sustaining higher prices; any attempt to do so would only "hasten[] the date on which [Kodak] surrender[s] to its competitors" in the equipment market.

Moreover, the issue is whether Kodak has market power over the *tying* product — parts. Evidence that Kodak maintains higher prices or lower quality for the

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[5] *See* Brief of Appellee at 11-12 (Nov. 10, 1988).

[6] Thus, this evidence, far from distinguishing *General Business Systems*, shows that Kodak lacks market power.

tied product — service — is irrelevant to that issue. The possibility that Kodak may have power over the tied product does not mean that it has power over the tying product.

The possibility that some Kodak equipment owners will pay higher service prices rather than switch to competitors' equipment is just a different way of advancing the "lock-in" notion that this Court has repeatedly rejected. In *General Business Systems, id.* at 975, this Court rejected the lock-in theory as a matter of law, stating that such an approach "would dictate that a manufacturer, facing competition against which it cannot prevail in the sale of its end product, could be found to monopolize the market for each unique component that goes into the product. This is surely to lose sight of the forest because of fascination with the trees." Other decisions in this Circuit have similarly rejected the lock-in theory as a basis for finding market power.[7] *Accord Telex Corp. v. IBM Corp.*, 510 F.2d 894, 917 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

The only case even arguably supporting the lock-in theory is *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). There, however, this Court did *not* find that an alleged

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[7] *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 293-95 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F.Supp. 423, 429 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981); *Delta Sys., Inc. v. TRW, Inc.*, slip op. at 4-5, No. C-81-1296 (RMB) (W.D. Wash. May 26, 1987), *aff'd*, 874 F.2d 815 (9th Cir. 1989) (table).

lock-in effect conferred market power on the defendant; it simply observed that lock-in "enhanced" economic power that the Court had already found from the existence of a copyright. 734 F.2d at 1341-43. *Digidyne* has been roundly criticized by other courts of appeals,[8] and this Court and courts within this Circuit have declined to apply it. *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 & n.4 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 179 (1988); *Tominaga v. Shepherd*, 682 F. Supp. 1489, 1495 & n.5 (C.D. Cal. 1988).[9]

Finally, the majority deemed significant the fact that, while Philips' share of its interbrand market never exceeded 5%, Kodak's share of its interbrand markets at one time approached as much as 23%. Op. at 3637. That is

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[8] *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 677 & n.3 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986).

[9] In an *amicus curiae* brief urging the Supreme Court to grant a writ of certiorari in *Digidyne*, the United States Department of Justice explained that the lock-in theory is unacceptable as a matter of sound economics because it improperly focuses only on the customer's post-purchase as opposed to pre-purchase alternatives. According to the Department, "the relevant time frame for measuring the seller's competitive position is when the buyer entered into the contract in preference to some alternative arrangement." Brief for the United States as Amicus Curiae at 15, *Data Gen. Corp. v. Digidyne Corp.*, No. 84-761 (U.S. May 1985). The lock-in theory "ignores how competition in the market operates," "depart[s] from commercial and economic reality" and "skews proper analysis" by erroneously assuming that buyers take no steps to avoid lock-in at the time of purchase and that the seller has no need or desire to attract new customers. *Id.* at 14-17.

an utterly meaningless distinction, however, in light of the *undisputed* fact that Kodak lacks market power in the interbrand markets. In any event, the Supreme Court has held that a 30% share is insufficient to show market power in a tying case. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 26-27 (1984).

2. The Section 2 Monopoly Power Claim

On the Section 2 refusal to deal claim, the majority admitted to "hav[ing] more trouble with the monopoly power . . . issue" (Op. at 3642) because monopoly power "is something more than the market power that is a prerequisite to liability under Section 1" (*id.* at 3643). As stated above, however, plaintiffs failed to present significant probative evidence to overcome summary judgment on their Section 1 claim. Since monopoly power under Section 2 is "something more" than market power under Section 1, they necessarily also failed to present significant probative evidence on their Section 2 claim.

Moreover, the majority's holding as to the relevant product market for the Section 2 claim cannot be squared with either *General Business Systems* or *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972). Plaintiffs defined the relevant market as the service of Kodak equipment. *See Op.* at 3642. The majority found a triable issue on that definition because, in its view, "[t]his court has strongly suggested that service of one company's micrographic equipment can be a relevant market under Section 2." *Id.* (citing *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480-81 n.3 (9th Cir. 1986), modified, 810 F.2d 1517 (9th Cir. 1987)).

Dimidowich does not remotely stand for any such proposition. Its intimation that service of a product and the product itself may be viewed separately was *solely* for purposes of determining whether two firms competed with each other and thereby determining whether their alleged concerted refusal to deal was a horizontal or vertical restraint under Section 1. The Court was not called on and did not purport to engage in the cross-elasticity of supply and demand and other analyses required to define a market under Section 2. At most, therefore, the Court's colloquial use of the word "market" was *dictum*.

Contrary to the majority's assertion, this Court has consistently rejected market definitions limited to a single manufacturer's equipment or to service therefor. In *General Business Systems*, 699 F.2d at 972, this Court rejected, as a matter of law, a market definition limited to mlcs used in defendant's computer systems in light of undisputed evidence of competition in the systems market. Numerous cases in this Circuit and elsewhere reject market definitions limited to one element of one manufacturer's products.[10]

This Court has also rejected efforts to define a market limited to servicing one manufacturer's products. In *Bushie*, 460 F.2d at 121, this Court affirmed summary

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[10] *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F.Supp. 965, 985 (N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); *ILC Peripherals*, 458 F.Supp. at 429; *A.I. Root*, 806 F.2d at 675; *Telex*, 510 F.2d at 919; *Allen-Myland, Inc. v. IBM Corp.*, 693 F.Supp. 262, 272-79 (E.D. Pa. 1988).

judgment against a complaint alleging a relevant market limited to servicing Stenocord equipment because there was no evidence "that Stenocord dominated the market for office dictating machines generally, or that it controlled a major share of the market for machines of its particular type."[11]

Under *General Business Systems, Bushie* and these other cases, there can be no market limited to one element (such as servicing) of one manufacturer's products if competition with other manufacturers prevents the exercise of monopoly power over the one element alleged to be the relevant market. In this case, the undisputed fact of interbrand competition precludes definition of a market limited to servicing Kodak equipment.

The majority's departure from this established market definition principle could invite groundless antitrust charges *whenever* an equipment manufacturer modifies its service arrangements to enhance its *interbrand* competitiveness in a manner not to the liking of intrabrand independent service firms. The threat that such litigation will survive summary judgment and advance to the point of permitting a jury to find "monopolization" of such a "market" chills precisely the kind of innovation and competition that the antitrust laws are intended to foster.

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[11] *See also Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 278-86 (5th Cir. 1978) (no market for servicing Beckman scientific instruments because service is an integral part of the equipment market), *cert. denied*, 440 U.S. 939 (1979); *Delta Sys.*, slip op. at 5 (granting summary judgment because alleged market for servicing Singer "System Ten" computers "is not warranted by the facts of the computer industry").

3. Misapplication of Summary Judgment Standards

The majority misapplied controlling standards for granting summary judgment in antitrust cases. On the market power issue, the majority conceded that interbrand competition "might prevent Kodak from possessing power in the parts market," that "equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts," and that Kodak's "desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service." Op. at 3634-35. Nevertheless, it concluded (*id.* at 3635-36 (citation omitted)) that it could not

> uphold the district court's grant of summary judgment on this theoretical basis. . . . [M]arket imperfections can keep economic theories about how consumers will act from mirroring reality. . . . While appellants have not conducted a market analysis and pinpointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality.

This approach ignores the Supreme Court's holding that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (emphasis by the Court). Thus, to show a "genuine" issue for trial in an antitrust case, a plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts" and "if the factual context renders [plaintiffs'] claim implausible — if the claim is one

that simply makes no economic sense — [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 586-87.

In *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), then-Judge Kennedy elaborated:

> It is the record made on summary judgment that controls, not that record plus speculative inferences a trier of fact might add; and the only inferences permitted from the summary judgment record itself are those that are reasonable given the substantive law which is the foundation for the claim or defense. Where a party asserts there is a genuine issue for trial . . . its argument is measured by the underlying theory of the claim or defense being considered. . . . [T]he substantive law is the law of antitrust, and if the claim makes no economic sense, a speculative inference from the jury will not help it. In such an instance, the record on summary judgment must contain further persuasive evidence if it is to support the claim.

Accord Eichman v. Fotomat Corp., 880 F.2d 149, 161 (9th Cir. 1989); *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 979 (9th Cir. 1988).[12]

The majority opinion in this case is contrary to these settled principles. The majority recognized the economic logic of Kodak's claim that interbrand competition precludes market power over parts or service, thus necessarily recognizing the economic *illogic* of plaintiffs' claim

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[12] Indeed, Judge Wiggins, the author of the majority opinion in this case, recognized these sound principles in *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 n.4 (9th Cir. 1988), but failed to apply them in this case.

that Kodak has such power. But far from requiring plaintiffs to provide "significant probative evidence" to support their claim, the majority simply speculated that "market imperfections" may be present in this case. Op. at 3635-36. It did not identify what those "imperfections" might be or impose on plaintiffs the burden of doing so because, in its view, that would somehow "elevate theory above reality." *Id.* at 3636.

But *Matsushita* and *Richards* impose just such a burden and require an antitrust plaintiff to present exceptionally persuasive evidence in opposition to a summary judgment motion where, as here, its claim does not make economic sense. Most importantly, these decisions preclude a court from denying summary judgment on the basis of speculative inferences such as the unidentified "market imperfections" cited in this case. Indeed, *Richards* expressly states that the question whether there is a triable issue *is* measured by the underlying theory of the claim or defense being considered. 810 F.2d at 902.

This Court has previously warned against "giv[ing] free rein to any plaintiff who can draft an antitrust complaint capable of withstanding a motion to dismiss to go to trial with only a wing and a prayer. . . . " *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). This is because "the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). Unless corrected, the majority opinion could encourage the filing of just the sort of meritless and vexatious complaints that *Matsushita* and *Richards* were intended to forestall and that inhibit an equipment manufacturer in its adaptation of service offerings to promote consumer preference for

its equipment. At minimum, the conflict between *Richards* and the majority in this case warrants rehearing *en banc*.

Conclusion

For the foregoing reasons, Kodak's petition for rehearing and suggestion of rehearing *en banc* should be granted.

Respectfully submitted,

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Dated: May 15, 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 88-2686

IMAGE TECHNICAL SERVICES, INC., et al.,

Plaintiffs-Appellants,

v.

EASTMAN KODAK COMPANY,

Defendant-Appellee.

APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C-87-1686-WWS

APPELLANTS' RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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P. Areeda & H. Hovenkamp, *Antitrust Law*, (Supp. 1989) 11

Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U.L. Rev. 661 (1982) 5, 6

INTRODUCTION

No court has ever held — or should hold — what Kodak and *amici* request: that in *every* case where inter-brand competition exists in equipment, summary judgment automatically bars a tying claim in *any* equipment-related "aftermarkets"[1] (presumably including parts, service, accessories, peripherals, etc).

Determination of market power turns upon the specific facts presented. Kodak argues that the majority erred in finding triable issues regarding market power because it ignored the "irrefutable economic principle" that if Kodak lacks power in the equipment market, it cannot "exercise power in a derivative aftermarket" such as repair parts. Kodak Petition ("K.P.") at 1.

Kodak and *amici* want this Court to discard extensive precedent that market power is fact-specific and replace it with generalized economic theory: that so long as a manufacturer competes at the equipment level, it can act with impunity in all related "aftermarkets," and cut off all antitrust challenges by summary judgment.

Even if some court were to declare erroneously that "aftermarkets" are "antitrust-free zones," that would simply recast the factual inquiry into a new question: What

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[1] Kodak and *amici* never precisely define "aftermarket," and with good reason. For if they succeed in reversing the majority, manufacturers such as Kodak, Hewlett-Packard, Wang, Digital Equipment and others will be given carte blanche to monopolize through ties or refusals to deal all their various "aftermarket" product lines if they face competition in one related product line.

constitutes an "aftermarket"? Parts? Service? Accessories? Enhancement devices? Peripherals? How "peripheral" must a peripheral be to constitute an "aftermarket" rather than an independent market? The factual inquiry into relevant market currently required by unbroken precedent, culminating in the majority here, resolves these questions. Giving Kodak an "aftermarket exemption" from tie-ins would add a new definition to the antitrust lexicon without providing any meaningful guidance.

The district court here, because it failed to grasp the tying arrangement, denied appellants factual discovery on relevant market and power therein. Thus, the majority found "a record that was not fully developed through discovery. . . . " Opinion ("Op.") at 3635. Nonetheless, the majority correctly concluded that appellants presented sufficient credible evidence to raise triable issues regarding Kodak's power over parts, to which it ties its service. This evidence (discussed below) consists of: the reality of market imperfections that destroy the abstract theoretical model Kodak advanced (and reiterates here); the reality that Kodak owners are "locked-in" to their equipment; and the reality that Kodak parts are unique. Op. at 3633-34. These showings would enable a trier to find a *per se* tie.[2]

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[2] *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 16-17 (1984) (market imperfections, unique product can result in market power); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1342-43 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985) (lock-in can enhance market power); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1481 n. 3 (9th Cir. 1986), *modified* 810 F.2d 1517 (9th Cir. 1987) (parts and service are brand-specific).

Kodak's second major argument depends on its first: since power over parts is theoretically "impossible" given competition in equipment, it was error to reverse summary judgment and remand for further discovery. Kodak claims *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986), holds that if an antitrust claim " 'is one that simply makes no economic sense,' plaintiff's burden to survive summary judgment increases." K.P. at 1. *Matsushita* is inapplicable.

In *any* Rule 56 case, antitrust or not, the non-moving party is entitled to "an opportunity to make full discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Until that opportunity is afforded, the evidence in opposition to summary judgment need not be admissible at trial. *Id.* at 324. *Matsushita* only holds that a plaintiff who has conducted full discovery but alleges an "implausible" conspiracy must oppose summary judgment "with more persuasive evidence to support [its] claim than would otherwise be necessary." 475 U.S. at 587. *Matsushita* does *not* hold that where some economic *theory* suggests no unlawful restraint on competition *should* occur, discovery must be denied in the face of evidence that *reality* is contrary to the theory. Because appellants' evidence (such as they were permitted to discover) was contrary to Kodak's theory, it was not error to reverse.

I. THE MAJORITY CORRECTLY HELD THAT TRIABLE ISSUES EXIST REGARDING KODAK'S TYING ARRANGEMENT.

A. Appellants Presented Triable Issues Of Whether Kodak Has Engaged In A Tie-In That Is Unlawful Per Se.

Kodak and *amici* attack the majority's legal precedents but ignore (except for attacking its admissibility)

the *evidence* presented, which demonstrates triable issues on all three *per se* tying elements. These are: (i) two distinct products or services, with purchase of one conditioned on purchase of the other, or, on an agreement not to purchase the other from another supplier; (ii) sufficient economic power in the first (tying) market to restrain competition in the second (tied) market; and (iii) an effect on a not-insubstantial volume of commerce in the tied market. *Mozart Co. v. Mercedes-Benz of North America. Inc.*, 833 F.2d 1342, 1345 (9th Cir. 1987), *cert. denied*, 109 S.Ct. 179 (1988). It is settled that Kodak will not sell parts (tying product) to an equipment owner unless that owner also purchases Kodak service (tied product) or at least agrees not to use appellants' service. Op. at 3631-33; Dissent ("Dis.") at 3643-44. The district court simply missed the tie. This major error has been corrected. Op. at 3631-32.

i. Two Distinct Products/Services – Conditioning.

There is no dispute that triable issues exist with respect to the first element, as Judge Wallace acknowledged (Dis. at 3644):

> I agree with the majority that Image Tech has raised triable issues as to whether Kodak's business practices constitute a tying arrangement.[3]

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[3] Judge Wallace's observation disposes of Kodak's refusal to "concede" the tie (K.P. at 3 n.1) and its argument that its parts policies constitute exclusive dealing rather than a tie-in.

(Continued on following page)

ii. Market Power In The Tying Product.

Appellants' evidence raised triable issues on the second element, market power in parts (the tying product).

(a) Market Imperfections.

The determination of relevant market and power therein "is basically a fact question, dependent upon the special characteristics of the industry involved." *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 363 (9th Cir. 1988). The district court did not reach these issues; the majority read *Jefferson Parish* against appellants' limited facts and concluded:

> Viewed in the light most favorable to appellants, the evidence that they have presented is sufficient to raise a material issue of fact as to whether Kodak has power in the parts market." Op. at 3637.

The majority noted that competition in equipment "might prevent" Kodak from exerting power over parts (Op. at 3634) but held that this economic theory could not substitute for the factual analysis required by *Jefferson Parish*, including analysis of market imperfections. Op. at 3635-36.

(Continued from previous page)

K.P. at 8-10. As demonstrated in appellants' Reply Brief, Kodak cannot take refuge in exclusive dealing cases such as *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972), because these cases do not sanction "impermissible methods" such as tie-ins to effectuate exclusive dealing arrangements. *Dimidowich*, 590 F. Supp. at 49-50, n.7.

Market imperfections that can "keep economic theories about how consumers will act from mirroring reality" (Op. at 3635-36) are demonstrably not "unknown factors" or "undefined," as Kodak sarcastically asserts. Rather, the majority's discussion of market imperfections was directly cited to footnote 24 of *Jefferson Parish*, where, the majority explained, the Supreme Court "note[d] that market imperfections can keep consumers from seeing the price and quality implications of a tying arrangement." *Id.* at 3636.

The majority's *Jefferson Parish* reference states:

> Especially where market imperfections exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, and hence it may impede competition on the merits. *See* Craswell, [Tying Requirements in Competitive Markets: the Consumer Protection Issues, 62 B.U.L. Rev. 661,] at 675-679.

Jefferson Parish, supra, 466 U.S. at 15 n. 24.

The Craswell article relied on by the Supreme Court lists a number of market imperfections which may engender tying-market power, corresponding with the facts here. Initially, Kodak sold its parts to anyone, without any tie to service. Kodak purchasers bought Kodak equipment in reliance on this policy, but Kodak changed this policy and refused to sell them parts if they used ISO rather than Kodak service. Op. at 3630. As Craswell states, one "market imperfection" is:

> Discovering whether or not a tie will even be imposed . . . [B]uyers have alleged that they were forced to buy the tied product . . . by the seller's threat to cut off the supply of the tying product after the initial purchases had already begun . . .
>
> Obviously, there will be no harm if the buyer can switch to some other source for the tying product when the original seller begins to insist on a tie. In some cases, though, the buyer would encounter significant transaction costs in switching to another supplier . . . Conceivably, the [seller] could then introduce new tying requirements that the [buyer] would not have originally agreed to, up to the point where the cost of such requirements exceeds the cost of switching to a different [seller's] system.

Craswell, *supra*, at 674-75. The same is true here. Kodak can tie its supercompetitively priced service to its parts up to the point where it would be less costly for the equipment owner to rip out his Kodak installation and switch to a competing manufacturer.

Another major "market imperfection" noted by Craswell relates to prospective Kodak purchasers, who are not omniscient or prescient regarding future costs of parts and service:

> The simplest explanation for tie-ins which do not benefit buyers is that the buyer was not aware of what he was agreeing to. This may be due . . . to the difficulty in calculating in advance of the sale just how much a tie-in is likely to cost over the course of the contract . . . The important point for the moment is that so long as buyers do not *perfectly understand* the tying arrangement, they will get into some ties that they would have preferred to stay out of, and which would represent a net efficiency loss.

Craswell, *supra*, at 672 (emphasis added and footnote omitted).

Thus, one "market imperfection" is that purchasers are not "perfect" — except perhaps in the *perfect* world of Kodak's *theoretical* economic model. A *real* purchaser has difficulty predicting, at the time of purchase, the cost of Kodak's tie-in over the life of the equipment.[4]

Supreme Court recognition that market imperfections can lead to market power, together with appellants' evidence of such imperfections, precludes Kodak's desire to substitute perfect theory for imperfect reality.[5]

(b) Economic Lock-In.

The "lock-in" created by the high cost of Kodak equipment enhances Kodak's power over parts. *Digidyne*,

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[4] The district court found that Kodak purchasers tend to keep their equipment for its useful economic life. Excerpts at 70. Although "purchasers of copiers consider costs of maintenance and repair in deciding which brand to buy," (Op. at 3634; Dis. at 3644) their knowledge is far from perfect. The evidence showed that copier purchasers "do not go through life cycle cost analysis for machines before purchasing machines." Record, No. 40, Dec. Hernandez ¶¶ 61-62.

[5] Although the market imperfections advanced in *Jefferson Parish* (principally, a "reference . . . to go to . . . the closest hospital," 446 U.S. at 26) were held *factually* insufficient to confer market power, the Court clearly recognized that other market imperfections, such as inadequate consumer information, properly substantiated, *can* result in market power, *Id.* at 27, and that "Congress has found these market imperfections to exist." *Id.* at 27 n. 45. If, as a matter of law, market imperfections could not suffice, the *Jefferson Parish* court clearly would not have devoted several pages to discussing the factual shortcomings of the imperfections advanced there.

734 F.2d at 1342-43. Unless they self-service, Kodak owners must use Kodak service, regardless of price. *See Dimidowich*, 803 F.2d at 1481 n. 3 (". . . an owner of broken [Bell & Howell] micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the owner's only option is to request service from [Bell & Howell . . .], that is obviously the market the owner faces").[6]

(c) Uniqueness.

Patents and copyrights can confer market power. *Jefferson Parish*, 466 U.S. at 16; *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962); *Digidyne*, 734 F.2d at 1341. Some of Kodak's parts are patented, its repair manuals are copyrighted, Kodak is the only source of its unique parts. Op. at 3633. Kodak's successful tie of its unique parts to its service provides further evidence of tying market power.

iii. Not Insubstantial Effect On Commerce.

No party disputes that the final element, effect on commerce in the tied service market, is satisfied.

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[6] The lock-in criticisms in the Department of Justice *Digidyne* brief (A.B. at 8 n. 9) presuppose perfect knowledge of the cost of the tie by the buyer at the time of purchase ("pre-purchase alternatives") ignoring the *Jefferson Parish* market imperfection reality that buyers rarely have such knowledge. Purchasers of Kodak equipment before it instituted the tie here certainly did not and *could not* have such knowledge.

B. The Opinion Is Not Inconsistent With *General Business Systems* Or Other Cases On Which Kodak Relies.

Kodak and *amici* contend *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983), holds that "as a matter of law, interbrand competition prevents the exercise of market power in any hypothetical interbrand market for parts or services." A.B. at 4. It does not.

In *Philips*, the magnetic ledger cards (mlcs) were a *component* of computers that were sold separately but without which the computers would not operate. Mlcs and computers were two parts of *the same product*, and hence could form only *one* market. With no market power in computers, there was *a priori* no market power in a component thereof, mlcs. The Kodak equipment, parts and service here would likely be found to be *separate* products in separate markets. Op. at 3632-33.

Because the computers were inoperable without mlcs, computer purchasers *had* to buy some mlcs when they bought the computer equipment and *were aware* of "the cost of mlcs as a major barrier to purchase," *id.* at 973, precluding a market imperfection. Because Kodak equipment purchasers do not buy spare parts when they buy equipment, they are ignorant of Kodak's tie at time of purchase. "Appellants' evidence distinguishes this case from *Philips*." Op. at 3636.[7]

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[7] *Philips* recognizes that, contrary to Kodak's claim, service can be a separate market from equipment or parts. Philips

(Continued on following page)

Kodak's reliance on the dissent in *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228 (7th Cir. 1988) (competition in equipment in *theory* precludes power over parts) is hardly persuasive. Although Judge Posner would substitute theory for facts, the majority there did not. It affirmed a jury verdict that Sterling had engaged in a *per se* tie by conditioning sale of its unique parts on plaintiff's purchases of motors. 866 F.2d at 232-34.[8] Plaintiffs in *Sterling*, were prospective "buyers" of new motors who had alternative suppliers, not "owners" of equipment needing parts and service who do not.

These cases do not hold that competition in equipment precludes power over parts, but demonstrate that careful factual product analysis is necessary to determine

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tied service to mlcs. This Court agreed that service was a distinct tying product, but held that Philips lacked power over service because it could not raise its service prices to supercompetitive levels. 699 F.2d at 977. "There [was] no evidence that Philips was the exclusive source of service, . . . the tying product. But appellants have presented evidence that many Kodak parts, the tying product, are unique and available only from Kodak." Op. at 3636-37. The Opinion is in perfect accord with *Philips*.

[8] One ground for affirmance was evidence of effective barriers to entry into the tying market (parts) since "the demand for Sterling parts could accommodate only one manufacturer." 866 F.2d at 233. Appellants did not have an opportunity to discover evidence on the likelihood that similar conditions obtain here. Thus, claims about lack of evidence on barriers to entry in the Kodak parts market are premature. A.B. at 5 n. 4.

market power. The majority correctly remanded for such analysis.

II. THE MAJORITY CORRECTLY APPLIED RULE 56 IN REVERSING SUMMARY JUDGMENT

Kodak and *amici* argue that *Matsushita, supra,* imposes a heightened burden on appellants that has not been met because some evidence here may be inadmissible. K.P. at 5-7; A.B. at 11-14, 4 n. 3. They are wrong.

The Supreme Court held in *Celotex Corp. v. Catrett, supra,* that summary judgment can be entered only *"after adequate time for discovery."* 477 U.S. at 322 (emphasis supplied). Unlike the situation here, the *Celotex* Court found that plaintiff had not been "railroaded" by a premature summary judgment motion but had been afforded adequate discovery. *Id.* at 326. The Court noted:

> Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, *if the nonmoving party has not had an opportunity to make full discovery.*

Id. at 326 (footnote omitted, emphasis supplied).

Kodak's summary judgment motion was unquestionably premature: it was filed before appellants conducted *any* discovery. Before their response, appellants were permitted a set of interrogatories, a document request, and six depositions — "only very limited discovery on the market power issue." Op. 3635 n. 4.

Ignoring these discovery handicaps, *Kodak* and *amici* attack the "isolated," "incidental," and allegedly "inadmissible" evidence presented. *Celotex* dispatches these objections:

> We do *not* mean that the nonmoving party must produce evidence in a form that would be *admissible* at trial in order to avoid summary judgment . . . Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves. . . . 477 U.S. at 324 (emphasis supplied).[9]

The Opinion is consistent with *Matsushita*. There, the Court held that because plaintiffs alleged an implausible conspiracy, they had to produce (after years of discovery) persuasive evidence. *Matsushita's* persuasive evidence requirement in "implausible" claims has been confined principally to conspiracy cases. P. Areeda & H. Hovenkamp, Antitrust Law ¶ 316.1b (Supp. 1989); *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522 (9th Cir. 1987); *Richards v. Nielsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). No such conspiracy allegation is at issue here.

III. THE MAJORITY CORRECTLY HELD THAT SECTION 2 MONOPOLIZATION AND ATTEMPT TO MONOPOLIZE CLAIMS PRESENTED TRIABLE ISSUES

The majority, the dissent, and Kodak acknowledge the existence of the exceptions to unilateral refusals to

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[9] *Accord, Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925-26 (9th Cir. 1987); *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 466 n. 12 (3d Cir. 1990); *Bushman v. Halm*, 798 F.2d 651, 655 n. 5 (3d Cir. 1986).

deal that: (1) "[a] monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason." Op. at 3641;[10] and (2) "[a] monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications." *Ibid.*[11]

Kodak argues that there are no triable issues as to Kodak's business "justifications." This argument has three fatal flaws: (1) business justifications must "predominate" over anticompetitive motives; (2) no cases relied upon have granted summary judgment on this issue; and (3) *Aspen* standards raise triable issues as to the "legitimacy" of Kodak's "justifications."[12]

A. Legitimate Business Reasons Must Predominate.

The dissent's standard to determine whether business "justifications" are "legitimate," is *Calculators*

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[10] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985) (*See also, Lorain Journal v. United States*, 342 U.S. 143 (1951)).

[11] *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973).

[12] Kodak also argues that appellants have not shown that Kodak is the only feasible source of some parts. This clearly is not so. As to patented and copyrighted parts Kodak clearly is the only source. As to other parts as well, ISOs cannot obtain them except through Kodak. Rec. No. 40, Dec. Hernandez ¶¶ 5, 7, 13, 60; Dec. Damiani ¶ 21; Dec. Welch ¶¶ 8, 21; Dec. Tamvacakis ¶ 10; Dec. Searle ¶¶ 15-16.

Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1332, 1339 (9th Cir. 1983), which states:

> It was Calculators' burden to prove that Brandt's acts "were predatory and not *predominantly motivated* by legitimate business purposes." *Lektro Vend Corp. v. Vendo Co.*, 660 F.2d 255, 273 n. 20 (7th Cir. 1981) *cert. denied*, 455 U.S. 921 (1982). Emphasis supplied.

This requires Kodak to show more than just plausible business justifications — which any paid expert can do — it requires factual proof of their "legitimacy" (*Calculators Hawaii*) or "validity" (*Aspen*). This translates to "predominantly motivated." Whether Kodak's proffered business "justifications" or appellants' extensive evidence of anticompetitive intent "predominantly motivated" its actions is a factual issue which is not subject to summary judgment.

B. The "Business Justification" Defense Is Not Subject To Summary Judgment Here.

Every case relied upon by Kodak and the dissent to support the "legitimate business justification" defense was determined on a complete factual record.[13] There is none here.

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[13] *Mozart, supra*, 833 F.2d 1342 (substantial evidence at trial supported jury finding of predominance of defendants' business justification); *Calculators Hawaii, Inc. v. Brandt*, 724 F.2d 1332 (9th Cir. 1983) (plaintiff failed to proffer *any* evidence of anticompetitive intent at trial). *Oahu, supra*, 838 F.2d 360 (defendant proved clearly at trial a predominate economic justification).

C. Triable Fact Issues Are Present Under Aspen Standards.

Aspen, like *Calculators Hawaii*, in evaluating the "legitimacy" of the "justifications" applied a "predominance" standard. For example, *Aspen* reasoned:

> Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose . . . The jury may well have concluded that Ski Co. elected to forego these short-run benefits because it was *more interested* in reducing competition in the *Aspen* market over the long run by harming its smaller competitor.

Id. at 608. (Emphasis supplied.)

Appellants showed the same factors from which the *Aspen* court found the business "justifications" of Ski Co. invalid, including: (1) a prior course of business dealings with competitors (ISOs); (2) a new policy (by Kodak) which was "an important change in the character of the market"; (3) substantial impact on competitors (ISOs); and (4) a substantial impact on consumers (Kodak equipment owners). *Aspen*, 472 U.S. at 605.[14]

In *Aspen*, Ski Co. offered Kodak's first "justification," a "desire to disassociate itself from . . . inferior [skiing] services." *Id.* at 609-610. This was rejected by the *Aspen* court because preserving the consumers' opportunity to

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[14] *Aspen* additionally set out types of anticompetitive evidence, also presented appellants, that refute Kodak's proffered business justifications, including: (1) statements made by officers or agents of the company; (2) evidence that the conduct was used threateningly and did not continue when a rival capitulated or (3) evidence that the conduct was not related to any efficiency. *Id.* at 608 n. 39.

choose between competitors "allowed consumers to make their own choice on these matters of quality." *Id.* at 610.[15] Appellants also presented substantial evidence directly refuting Kodak's claim of high quality service.[16]

Kodak's second "justification" — reduction of inventory costs — is clearly pretextual and Kodak has not rebutted appellants' logic that "equipment owners' need for Kodak-supplied parts is determined only by the frequency of [Kodak] equipment failure." Op. at 3639. This is even supported by Judge Posner's dissent in *Parts & Electric Motors*.[17] Kodak's "justification" here simply makes no economic sense. Kodak will inventory parts based on the Kodak machine population and may even inventory more parts if it services them all rather than shares service with ISOs.[18]

Kodak's third "justification" — that it has a right to refuse to deal and require ISOs to produce their own

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[15] *See, Northern Pacific Ry. v. U.S.*, 356 U.S. at 4, ("the unrestrained interaction of competitive prices will yield the best allocation of our economic resources, the lowest prices, the highest quality").

[16] There was substantial evidence that ISO competitors both lowered price and increased the quality of service. Record, No. 40, Dec. Damiani ¶ 5; Dec. Hernandez ¶¶ 10, 20, 24, 48-50; Dec. Welch ¶ 23-25; Dec. Searle ¶ 7.

[17] "Since Sterling sells only one-tenth of one percent of all industrial motors sold in the United States, it is a reasonable guess that it sells no more than one-tenth of one percent of the replacement parts for industrial motors." 866 F.2d at 236.

[18] Appellants' evidence showed that ISOs inventoried parts themselves, actually reducing Kodak's inventory costs. Record, No. 40, Dec. Welch ¶ 18; Dec. Tamvacakis ¶ 6.

parts to compete in service — falls under *Aspen, Otter Tail* and *Lorain Journal*. Appellants' Section 2 claims are exceptions to Kodak's alleged right or "justification" to refuse to deal.

There are clearly triable issues of fact as to whether Kodak's proffered business "justifications" are "valid," "legitimate" and "non-pretextual" and whether Kodak's acts were "not predominantly motivated by legitimate business purposes."

CONCLUSION

Kodak's petition for rehearing should be denied.

Dated: June 7, 1990 Respectfully submitted,

LAW OFFICES OF
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(13)

No. 90-1029

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In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC.; J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICRO-GRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, D/B/A G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, D/B/A MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Does a vertically-integrated equipment manufacturer which concededly lacks market power in fiercely competitive interbrand equipment markets violate the Sherman Act by declining to sell replacement parts to independent service organizations?

2. Did the Court of Appeals properly permit a *per se* tying claim based on the alleged tying of two single brand aftermarkets (tying Kodak service to Kodak parts) that are wholly derivative of a competitive interbrand equipment market?

3. Does speculation about unspecified market imperfections constitute the "more persuasive evidence" required under *Matsushita* to defeat summary judgment in an economically implausible antitrust case?

4. If a manufacturer has no market power in an interbrand equipment market and has legitimate business justifications for not selling replacement parts to service competitors, can it monopolize a market limited to service of its own equipment on the theory that its own branded replacement parts constitute an "essential facility?"

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this brief identifies all parties in the lower court. Petitioner Eastman Kodak Company has no parent corporation. Kodak's subsidiaries, other than wholly owned subsidiaries, are listed below:

Actifoto, LDA
Bellevue Photo S.A.R.L.
Consumer Developments Ltd.
Dainichiseika-Sterling Co., Ltd.
Ditram S.A.R.L.
India Photographic Company Limited
Inrock Chemical Co. Ltd.
K.K. Big Color Service
K.K. East West
K.K. Hiyama Photo Studio
K.K. IS Photo
K.K. Joy
K.K. Kyohai
K.K. Nihonbashi Pro Color
K.K. Qualte
K.K. Techni-Color Angel
Kodak & H-Color De Forenede Fotolabortorier A/S
Kodak Imagica K.K.
Kodak Japan Ltd.
Kodak Korea Limited
Kodak Lab Chiba K.K.
Kodak Lab Shizuoka K.K.
Kodak Lab Kanagawa K.K.
Kodak Medical Ltd.
Les Laboratoires Photographiques de France S.A.
LK-TEL Video S.A.
Mackwoods-Winthrop Ltd.
Miller Bros. Hall & Company Limited
Muebles Andes S.A.
Nippon System House Co., Ltd.

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P.T. Sterling Products Indonesia
Photo Finishers (Glasgow) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Sterling Drug (Malaya) Sdn. Bhd.
Sterling Farmaceutica Portuguesa Lda.
Sterling Products (Ghana) Ltd.
Sterling Products (Nigeria) Ltd.
Sterling Products Pakistan (Private) Ltd.
Sterling Yamanouchi Pharmaceutical Inc.
Taylors Developing & Printing Works Limited
Videoplex, Lta.
Winster Pharmaceuticals Ltd.
Y. K. Kamata Pro Photo
Yamagata Taigyo, Ltd.

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No. 90-1029

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, D/B/A G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, D/B/A MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 903 F.2d 612 (9th Cir. 1990), and is reprinted in the

Appendix to Petitioner Eastman Kodak Company's Petition for *Certiorari* ("Pet. App.") at 1A-28A. The District Court's unpublished opinion and order granting Kodak's motion for summary judgment is reprinted at Pet. App. 29B-38B. The Court of Appeals' unpublished order denying Kodak's petition for rehearing is reprinted at Pet. App. 39C-40C.

JURISDICTION

The Court of Appeals entered judgment on May 1, 1990. It denied a timely petition for rehearing on September 21, 1990. The Petition for *Certiorari* was filed on December 20, 1990 and was granted on June 17, 1991. This Court has jurisdiction to review the judgment by writ of *certiorari* under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. They are set out verbatim at Pet. App. 41D.

STATEMENT OF THE CASE

A. The Parties and the Market Setting

1. Kodak's place in the interbrand equipment markets

Kodak makes and sells complex business machines — specifically, high volume photocopiers and micrographics equipment. In interbrand equipment markets,

Kodak faces fierce competition from large American and Japanese corporations. Kodak's copier competitors include Xerox, Savin, Canon, Ricoh, and Minolta. Kodak's micrographics competitors include Bell & Howell, 3M, Canon and Minolta. Joint Appendix ("J.A.") 158, 177-78. Kodak's market share is 23% in the high volume segment of the copier market and 20% in the micrographics equipment market. J.A. 158, 176-77. Respondents concede, and the Court of Appeals held, that Kodak does not have market power in either market. Pet. App. 8A n.3.

Like all sophisticated business equipment, Kodak's copiers and micrographics products require regular service and occasional repairs to function properly. J.A. 160, 179. So, as an integral part of its equipment sales business, Kodak sells service and makes or procures replacement parts used in service. Kodak provides service contractually, three different ways: (1) initial warranty service, included in the purchase price of the equipment; (2) annual service contracts, which include regular maintenance, repairs, and all necessary parts; and (3) time and material service on a "per call" basis. Kodak does not compel its equipment owners to purchase Kodak service. Indeed, Kodak customers who service their own equipment can purchase parts separately. J.A. 171-72, 190.

It is undisputed that purchasers of copiers and micrographics equipment consider service costs (including the cost of parts) to be an important component of total

equipment costs. Pet. App. 8A, 20A.[1] These aggregate "life cycle" costs are the true economic costs of Kodak's equipment. Any increase in parts or service prices necessarily increases life cycle costs and, therefore, has the same effect as a direct increase in equipment prices. J.A. 161-62, 180. Accordingly, Kodak must price its parts and service offerings competitively; otherwise, the life cycle costs of using its products will be too expensive and businesses will simply buy another manufacturer's machines. J.A. 162, 180. In this way, the competitive conditions in the equipment markets prevent Kodak from charging supercompetitive prices in any alleged aftermarkets for Kodak parts or service.

[1] Recently, respondents asserted for the first time that "there was no such concession" in the Court of Appeals. (Respondents' Supp. Brief in Opp. to Pet. for *Cert.* at 2) That is not true. Respondents conceded below that in the interbrand markets, prospective buyers of equipment "can shun an equipment seller whose parts and service are priced too high." J.A. 855. Respondents have also asserted that "consumers were well aware and cared about" the relative prices of Kodak and ISO service. (Brief in Opp. to Pet. for *Cert.* at 16 n.6) Moreover, the concession does not matter because it is undisputed Kodak operated under the assumption that prospective customers assessed the total cost of equipment, service and parts at point of sale, J.A. 161, 163, 179-80, and it is Kodak's conduct and the Court of Appeals' understanding of it that are at issue. Further, for Kodak to be effectively constrained from engaging in anticompetitive conduct, it is sufficient that a significant number of Kodak's customers consider life cycle costs. *See* note 8, *infra*. That, at the very least, is undisputed. In any event, it is too late for respondents to complain about the purported inaccuracy of the Ninth Circuit's decision, having failed to mention it in connection with Kodak's petition for rehearing in the Ninth Circuit and in its opposition to Kodak's petition for *certiorari*.

In order to enhance the competitiveness of its copiers and micrographics products, Kodak has pursued a policy of providing the highest quality service. Industry surveys have consistently rated Kodak's service the best available and Kodak's equipment the most dependable. J.A. 182. Kodak's marketing efforts emphasize its exceptional service ratings and capabilities. J.A. 163-66, 182-83; Documents Lodged with the Clerk at L041-070.

2. Independent service organizations

Respondents are 18 independent service organizations ("ISOs") located in ten different states. J.A. 6-9. They service Kodak copier and micrographics equipment, but do not manufacture parts for use in their service business. J.A. 9-10. Instead, respondents insist that Kodak must aid them in their business efforts by making, stocking and selling them Kodak parts (defined as tools, test equipment, supplies and service manuals), which they use *solely* to compete against Kodak. There is no evidence that respondents could not obtain their own parts, either by making them, buying them from original equipment manufacturers ("OEMs"), or disassembling used equipment.

B. Kodak's Practices and the Reasons for Them

The fundamental conduct at issue is Kodak's practice of not selling parts to ISOs, a simple unilateral refusal to deal. J.A. 171, 189-90. Respondents attack this conduct as monopolization and a *per se* illegal tying arrangement. The bases for the tying characterization are respondents' claims, which Kodak denies, that parts and service are

economically distinct products and that Kodak refuses to sell parts to its equipment customers if an ISO services the equipment.

There are three main business reasons for Kodak's refusal to sell parts to ISOs: (1) to promote interbrand equipment competition by allowing Kodak to stress the quality of its service; (2) to improve asset management by reducing Kodak's inventory costs; and (3) to prevent ISOs from free riding on Kodak's capital investment in equipment, parts and service.

1. Promoting interbrand competition

The relationship of service to the underlying equipment offering was central to Kodak's decisions to adopt the challenged practices.[2] J.A. 168, 171, 185. Kodak determined that it could best maintain high quality service for its sophisticated equipment by providing service itself. J.A. 168, 185. Thus, much as a manufacturer might decide to distribute its product directly rather than through independent distributors, Kodak decided not to sponsor independent, and potentially inferior, service organizations by offering them parts. Kodak believes that its service strategy enhances its ability to compete with Xerox, Canon and the other manufacturers, as discussed above. J.A. 137-38, 147-48.

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[2] Kodak established its parts practice for copiers at the time it entered that business in 1975. J.A. 184. Kodak first applied the practice to micrographics equipment in 1985. J.A. 148. It continues to sell ISOs parts for micrographics equipment introduced before 1985. J.A. 148-49.

Kodak's direct service strategy also strengthens its relationships with existing equipment customers. When an ISO has displaced Kodak, Kodak loses the day-to-day contact that it has found crucial to keeping its customer satisfied and learning of potential new sales opportunities. Even more important, divided responsibility for product performance inevitably leads to "finger-pointing." Whenever an ISO cannot repair a problem, Kodak is blamed for an equipment malfunction, even if the problem is the result of improper diagnosis, maintenance or repair by an ISO. Kodak may never even hear of the problem, yet its future sales opportunities are jeopardized. By providing service directly, Kodak can respond to customer needs and develop lasting relationships. J.A. 168-69, 186-87.

2. Controlling inventories

A second reason for the challenged practices is to improve asset management by reducing Kodak's inventory costs. In early 1985, Kodak had over $16 million of micrographic equipment parts in stock. As a company-wide effort to improve its asset management, Kodak began looking for ways to reduce and better control its parts inventory. One way was to stop making, buying and stocking parts for the benefit of ISOs. J.A. 146-47, 170-71.

3. Not supporting free riding

Respondents claim a right to free ride. That is, they want to exploit the investment Kodak has made in product development, manufacturing and equipment sales in

order to take away Kodak's service revenues. Respondents refuse to make any like investment, as Kodak's equipment competitors have, nor even the much smaller investment to make their own parts. They have targeted the least capital-intensive segment of Kodak's equipment business — service — and ask Kodak to supply them with parts.

Kodak already faces stiff interbrand competition from major companies that have large investments in these industries. It is challenge enough for Kodak to make an adequate return on its investments in that setting, and service revenues are an important part of Kodak's total return. Because of these concerns, Kodak decided not to support the activities of free riders such as respondents. J.A. 137, 147-48, 187-88.

C. Course of Proceedings and Disposition Below

The complaint was filed on April 14, 1987, in the District Court for the Northern District of California and assigned to the Honorable William W Schwarzer. Kodak moved for summary judgment four months later after respondents failed to initiate discovery. Kodak's motion was in part intended to frame the issues that genuinely required discovery, and when respondents thereafter requested discovery on the market power issues, Kodak did not object. J.A. 248. At an initial status conference, Judge Schwarzer encouraged respondents to obtain documents, interrogatory answers, and depositions which would permit them to oppose Kodak's motion on the merits. Respondents did so, and, among other things, deposed several Kodak management personnel. At a later

status conference, Judge Schwarzer allowed further discovery on the market power issues. Pet. App. 36B-37B. On February 1, 1988, after almost six months of discovery, respondents filed their opposition papers. J.A. 408.

Judge Schwarzer granted Kodak's motion for summary judgment on respondents' *per se* tying and monopolization claims. Pet. App. 29B-38B.

The Ninth Circuit, in an opinion by the Honorable Charles E. Wiggins, with a dissent by the Honorable Clifford J. Wallace, reversed Judge Schwarzer's ruling. As to the *per se* tying claim, the majority acknowledged that Kodak does not have market power in the interbrand equipment markets. Pet. App. 8A n.3. The majority also conceded that interbrand competition "might prevent Kodak from possessing power in the [Kodak] parts market," that "equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts," and that Kodak's "desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service." Pet. App. 8A-9A.

Nonetheless, the majority dismissed Judge Schwarzer's ruling as resting on a "theoretical basis." Pet. App. 10A. It concluded that Kodak might have market power in an intrabrand parts market, despite respondents' concession that Kodak lacked interbrand power, because "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id*. Neither respondents nor the majority identified any market imperfections, and there is no evidence of imperfections. Rather, the majority held that respondents did not have to

identify specific market imperfections or conduct "a market analysis," because "a requirement that they do so in order to withstand summary judgment would elevate theory over reality." *Id*. The majority then rejected Kodak's business justifications as conceivably "pretextual" and because it believed denying parts to ISOs was not necessarily the least restrictive method to accomplish Kodak's business objectives. Pet. App. 12A-15A. Accordingly, the majority revived respondents' admittedly implausible tying claim.

The majority also reversed Judge Schwarzer's grant of summary judgment as to respondents' Section 2 monopolization claim. It found that the relevant market could be limited to the aftermarket for service of Kodak brand equipment and that Kodak might have monopoly power in that single-brand "market." Pet. App. 19A. Once again, the majority found "logical appeal" in Kodak's claim that it could not have monopoly power in any aftermarket because it lacked equipment market power. *Id*. But the majority deemed itself unable to "say that this theory mirrors reality," despite the absence of evidence to the contrary. *Id*. The majority then, once again, dismissed Kodak's business justifications as conceivably "pretextual" and not "genuine." Pet. App. 18A.

Judge Wallace dissented. As to respondents' *per se* tying claim, Judge Wallace reasoned that interbrand equipment competition necessarily precluded Kodak from having any market power in a parts market. Citing Judge Richard Posner's analysis in *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988), Judge Wallace explained that any effort by Kodak to

engage in supercompetitive pricing in a parts market would be "to its long term disadvantage." Pet. App. 21A.

> [C]ompetition in the interbrand market dictates a simple choice: Kodak may either price parts competitively and maintain its interbrand market share, or it may price parts supercompetitively -- yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case, Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. The result would be "a brief perturbation in competitive conditions -- not the sort of thing the antitrust laws do or should worry about."

Pet. App. 23A.

As to respondents' monopolization claim, Judge Wallace noted that Kodak had presented uncontradicted evidence of a legitimate business justification: controlling service quality. "*Any* business justification — whether or not it is the least restrictive -- will defeat an attempt-to-monopolize claim." Pet. App. 27A. Thus, even if Kodak's practices were motivated in part by a desire to deny ISOs parts, Judge Wallace reasoned that Kodak's legitimate business justifications mandated summary judgment as to respondents' Section 2 claims.

SUMMARY OF ARGUMENT

All parties to this litigation, and the Ninth Circuit, agree that Kodak lacks market power in the interbrand

copier and micrographics equipment markets. All parties, and the Ninth Circuit, agree that purchasers of copiers and micrographics equipment, when selecting among competing equipment vendors, consider parts and service costs, as well as equipment costs, and will "shun" manufacturers whose total package of equipment, service and parts is "priced too high." J.A. 855.

These undisputed facts preclude the market power necessary to support tying liability under Section 1 of the Sherman Act and the monopoly power necessary to support monopolization liability under Section 2 of the Sherman Act. That is true whether or not Kodak has a dominant share of Kodak-brand parts and service aftermarkets. If Kodak raised its parts or service prices above competitive levels, potential customers would simply stop buying Kodak equipment. Perhaps Kodak would be able to increase short term profits through such a strategy, but at a devastating cost to its long term interests. Thus, due to fierce competition in the interbrand equipment markets, Kodak cannot exercise market power or act anticompetitively in any derivative parts or service aftermarkets.

The Ninth Circuit agreed that interbrand equipment competition would ordinarily prevent Kodak from raising service prices above competitive levels. However, the majority ultimately lost sight of this principle and reversed summary judgment because of an unexplained possibility that the principle might not apply in this case. This "lose[s] sight of the forest because of fascination with the trees." *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 975 (9th Cir. 1983). The Ninth Circuit's decision is unfounded in the law, incompatible

with the economic and competitive realities underlying the Sherman Act, and contrary to this Court's rulings concerning the role of summary judgment in antitrust litigation.

The Ninth Circuit majority misapplied the market power requirement. First, it held that something "short of actual market power" plus some unspecified "market imperfections" might create tying market power in a Kodak brand parts market. Pet. App. 10A, 12A. That holding is contrary to the requirement of *actual* market power in tying cases reaffirmed by this Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

Second, the majority speculated that Kodak customers might be "locked-in" to Kodak equipment post-sale and therefore insensitive to price. Pet. App. 11A. But the "lock-in" theory does not work either — Kodak must still price competitively to attract new and repeat customers, essential to its survival. The uncontroverted evidence is that Kodak's parts and service pricing is constrained by interbrand equipment competition.

Third, the majority's decision is contrary to the summary judgment standards articulated in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). These cases require the party opposing summary judgment to "set forth specific facts showing that there is a genuine issue for trial," *Anderson*, 477 U.S. at 256, and for antitrust plaintiffs who bring implausible claims — ones that simply make no economic sense — to present even "more persuasive evidence" than ordinarily required. *Matsushita*, 475 U.S. at 587. Here, respondents offered no evidence, let alone persuasive evidence, that Kodak can harm competition in parts or service aftermarkets.

The same analysis disposes of respondents' monopolization claims. If interbrand equipment competition precludes tying market power in derivative aftermarkets, it surely precludes monopoly power in those markets. The Ninth Circuit's speculation that Kodak might have monopoly power in a Kodak brand service market is therefore erroneous. Further, the majority erred by holding that Kodak brand parts could be "essential facilities" that Kodak is required to share with competitors, and by ignoring Kodak's undisputed evidence that its conduct was justified by a high quality service strategy. For these reasons, Kodak's refusal to sell parts to ISOs does not constitute monopolization.

Ultimately, the Ninth Circuit's decision may discourage competition. A manufacturer's ability to innovate and to succeed in competitive interbrand markets is enhanced by its freedom to develop parts and service strategies that improve its total systems offerings. The decision below threatens that freedom. If the decision is allowed to stand, potential innovators will have less incentive to develop new products in service-intensive lines of business for fear that they will expose themselves to treble damage actions at the hands of aftermarket service competitors.

ARGUMENT

I. Kodak's Conceded Lack of Interbrand Market Power Precludes Antitrust Liability.

Respondents' tying and monopolization claims are deficient on several grounds, including (1) that parts and service are not distinct products which can be tied

together,[3] (2) that Kodak's conduct was a unilateral refusal to deal, not a tying arrangement,[4] and (3) that

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[3] J.A. 124-29, 699-701. Replacement parts are an input into service, have no other economic function, and there is no demand for parts other than to provide service. Accordingly, under the standards articulated in *Jefferson Parish* for establishing two products, parts and service are but one product, and cannot be the basis of a tying allegation. *Jefferson Parish*, 466 U.S. at 19-21; *id.* at 39 (O'Connor, J., concurring) ("the tied product must, at a minimum, be one that consumers might wish to purchase separately *without also purchasing the tying product*") (emphasis in original).

[4] J.A. 125-26. Until now the law uniformly protected, as unilateral refusals to deal, manufacturers' refusals to sell replacement parts so long as the interbrand equipment market was competitive. *See Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Nobel Scientific Indus., Inc. v. Beckman Instr., Inc.*, 831 F.2d 537 (4th Cir. 1987), *aff'g and adopting* 670 F. Supp. 1313, 1321 (D. Md. 1986), *cert. denied*, 487 U.S. 1226 (1988); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986), *modified on other grounds*, 810 F.2d 1517 (1987); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1337-38 (9th Cir. 1983); *Spectrofuge Corp. v. Beckman Instr., Inc.*, 575 F.2d 256, 282 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979). The sole basis for respondents' tying claim is the contention, which Kodak denies, that Kodak will sell parts separately to its direct equipment customers only if the customer agrees not to use ISO service. Respondents say this is a tying arrangement under *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958), which defined a tie as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, *or at least agrees that he will not purchase that product from any other supplier.*" *Id.* at 5-6 (emphasis added). The latter half of this definition has been criticized on the ground that it blurs the distinction between genuine tying and related practices such as exclusive dealing. *See* ABA Antitrust Section, *Monograph No. 8, Vertical Restrictions Upon Buyers Limiting Purchases of Goods from Others* 89 (1982).

"Kodak service" is not a relevant market which can be restrained or monopolized.[5] However, Kodak has always stressed as its primary argument the undisputed fact that it lacks market power in the interbrand copier and micrographics equipment markets. An equipment manufacturer that faces vigorous competition from other manufacturers and that, accordingly, lacks interbrand market power cannot have power — in any sense that should concern the antitrust laws — in a wholly derivative aftermarket. Respondents' *per se* tying[6] and monopolization claims therefore fail.

A. Market Power Is Required For Tying and Monopolization Liability.

The two antitrust offenses charged here — *per se* tying and monopolization — require a finding of market

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[5] Single-brand service markets are not relevant to antitrust analysis because of the restraining effects of interbrand equipment competition. *See* Part II.A., *infra*. Kodak believes it is simpler to focus on interbrand equipment competition directly, rather than indirectly through market definition, but the two methods of analysis are different sides of the same coin and should not affect the outcome. *See* Brief *Amici Curiae* of Data General Corp. *et al.* for a complete discussion of the market definition perspective.

[6] Respondents have waived any rule of reason tying claim. Pet. App. 4A n.1. The Court may nonetheless wish to consider whether there is any continuing utility in referring to tying arrangements as *per se* illegal given that courts must consider tying market power, substantial adverse affects in the tied product market, and business justifications before condemning a tie. *Compare Jefferson Parish*, 466 U.S. at 11-18, *with Northern Pacific*, 356 U.S. at 5 (*per se* offenses presumed unreasonable "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use").

power. This Court's decision in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984), reaffirmed the requirement of actual market power in tying cases: "[W]e have condemned tying arrangements when the seller has some special ability — usually called 'market power' — to force a purchaser to do something that he would not do in a competitive market." Respondents' Section 2 claim requires an even stronger showing of market power, because, as the Ninth Circuit conceded, monopoly power "is something more than the market power that is a prerequisite to liability under Section 1." Pet. App. 19A; *see United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (monopoly power is "the power to control market prices or exclude competition"). If Kodak does not possess Section 1 market power, *a fortiori* it cannot possess Section 2 monopoly power.

Kodak's refusal to sell parts to ISOs cannot enhance or abuse a market power Kodak does not have. It is undisputed that Kodak equipment, parts and service are functionally interrelated; that Kodak markets equipment and service together, J.A. 160-61, 179; and that equipment purchasers consider total costs in choosing among competing equipment sellers. Thus, as Judge Wallace's dissent recognized, an increase in parts or service prices amounts to an increase in the cost of Kodak's equipment: "If Kodak attempts to increase the price of replacement parts above the competitive level, new buyers will increase their estimates of the total price (including parts and service) of a Kodak copier." Pet. App. 20A-21A.

Kodak's behavior mirrors Judge Wallace's analysis. The undisputed evidence, tested by discovery, is that

Kodak prices its parts and service so as not to adversely affect its equipment sales. J.A. 162, 180. In this way, the competitive conditions in the equipment market act as a market check on Kodak's ability to exercise power in aftermarkets. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977) (interbrand competition "provides a significant check on the exploitation of interbrand market power"); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725 (1988) (same).[7]

Respondents' contention that Kodak "overcharges" for service ignores the relationship between the equipment markets and the aftermarkets. Whenever a manufacturer sells complementary products, such as equipment and service, it must consider how these products are priced in relation to each other. At the extremes, it could (a) offer the product under an extended warranty, in which case the purchaser pays for service in the purchase price, or (b) sell the equipment at the lowest possible purchase price and charge relatively high prices for post-sale service. Firms attempting to respond to competitive dynamics may have legitimate reasons to pursue strategies at any point along this spectrum. *See United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610,

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[7] We recognize that in these cases the Court was confronted with intrabrand competition in the sense of two or more resellers selling the same brand name product. Here, of course, ISOs sell their own brand of service. From the perspective of consumers, however, the distinction is immaterial, since interbrand equipment competition is as much a restraining influence on Kodak's aftermarket practices as it would be on distribution practices limiting the resale of Kodak brand products.

618 (1977) (expensive houses packaged with inexpensive financing). But no matter which strategy it pursues, a seller without market power cannot possibly do better than obtain a competitive return on its overall investment, and it "cannot sustain deleterious practices" that harm consumers. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L. J. 135, 159 (1984). Accordingly, antitrust courts need not intervene.

> Given that a practice indulged without market power is either beneficial to consumers or self-defeating to its practitioners, why use the courts to condemn the conduct? . . . [C]ondemning questionable practices pursued by firms without [market] power will spin the wheels of the courts — at great expense — for no substantial result. Markets have a comparative advantage over courts in dealing with the conduct of firms that lack market power.

Easterbrook, *Comparative Advantage and Antitrust Law*, 75 Calif. L. R. 983, 989 (1987).

Nor would it make any difference if Kodak tried to "overcharge" for service through tying arrangements. Without market power in the interbrand equipment markets, Kodak cannot raise system prices through tying arrangements any more than it could by raising equipment prices directly. Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. 19, 20 (1957) ("[a] competitive supplier, selling at the prevailing price and attempting to impose a tie-in upon a buyer, would merely be displaced by a seller who did not"). *Jefferson Parish* recognized this explicitly: "If the seller of flour has no market power over flour, it will gain none by insisting that its buyers take some sugar as well." 466 U.S. at 37-38

(O'Connor, J., concurring). Thus this Court has restricted liability for tying to those cases in which the package price is supercompetitive. *Fortner*, 429 U.S at 618 (tying is not unlawful where "the price for the entire package was equal to, or below, a competitive price"). Interbrand equipment competition restrains Kodak's ability to obtain supercompetitive returns through any device, including aftermarket tying arrangements.

Past cases consistently recognized these economic realities. In *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983) (Sneed, J.), the Ninth Circuit found that, as a matter of law, interbrand equipment competition precluded the exercise of market power in an alleged derivative aftermarket for Philips magnetic ledger cards. The court rejected the notion "that a manufacturer, facing competition against which it cannot prevail in the sale of its end product, could be found to monopolize the market for each unique component that goes into the product." 699 F.2d at 975.

Post-*Jefferson Parish* courts and jurists have reached the same conclusion. In *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.), the First Circuit held that an automobile manufacturer's lack of interbrand market power meant it could not have market power over spare parts for its automobiles. In *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986), the Sixth Circuit held that a computer hardware supplier's lack of interbrand market power precluded any market power over a derivative software market. And in *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988), Judge Posner, in dissent, described how overcharging for parts would be a

short-term, self-defeating strategy that need not concern the antitrust laws.[8]

The Ninth Circuit effectively ignored this fundamental principle. Neither the substantive nor procedural basis for its decision withstands scrutiny.

B. Purported Market Imperfections Do Not Excuse Respondents from Proving Genuine Market Power.

The Ninth Circuit majority sidestepped Kodak's lack of interbrand market power by stating that normal economic reasoning might not apply. Purporting to rely on *Jefferson Parish*, the Ninth Circuit determined that "[s]ome strength . . . short of actual market power . . . combin[ed] with other factors" was sufficient for *per se* liability. Pet. App. 12A. Specifically, it held that interbrand market shares of not more than 23% plus unspecified "market imperfections" created a triable issue as to tying market power in a Kodak parts aftermarket. *Id.* at 10A, 12A.

The majority's conclusion is directly contrary to *Jefferson Parish*, which addressed the same issue. The Fifth Circuit had held that the combination of East Jefferson Hospital's 30% market share and market imperfections in the form of imperfect consumer information and other factors were sufficient to create tying market power. This Court reversed. "While these factors may generate 'market power' in some abstract sense, they do not generate

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[8] Judge Posner wrote in dissent because the majority in *Parts and Electric*, believing that the defendant had waived the issue, declined to address market power.

the kind of market power that justifies condemnation of tying." 466 U.S. at 27.

In any event, respondents have never produced, and the majority did not cite, any evidence of competitively significant market imperfections in the copier or micrographics equipment markets. Pet. App. 10A (respondents "have not . . . pin-pointed specific imperfections in the copier and micrographics markets"). Respondents claim that market imperfections *must* exist — despite their failure to show any — because "the actual 'aftermarkets' in which Kodak competes [have] not behaved as Kodak's economic theory would suggest." Brief in Opp. to Pet. for *Cert.* at 9. The majority apparently accepted this argument when it cited and relied upon respondents' claims that Kodak service was "overpriced." Pet. App. 10A-11A. But this misses the point. The question is not how the aftermarkets perform *standing alone*, but whether supercompetitive pricing in the aftermarkets could enhance Kodak's overall position -- and, conversely, harm consumers -- given the inevitable effects of aftermarket pricing on Kodak's future equipment and service sales. The answer is no. Kodak's conceded lack of market power in the equipment market dooms any attempt to extract monopoly profits, even in allegedly "imperfect" aftermarkets.

The fact that respondents may charge less for service than Kodak does not prove, or even raise a triable issue, that Kodak has market power. Respondents are free riders. They exploit Kodak's investments in these markets, do not make similar investments and, therefore, by definition, have a much lower cost base than Kodak. They are analogous to the no-frill discounters described by the

Court in *Sharp Electronics*, 485 U.S. at 721, who were able to undercut the prices charged by full-service retailers because they refused to match the latters' investments in promotion. Free riding is itself a market imperfection, the elimination of which, the Court has held, justifies restrictive competitive practices. *GTE Sylvania*, 433 U.S. at 55; *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984) (manufacturers may properly take steps to "see that 'free-riders' do not interfere"). Thus, it is circular for free riders to use comparisons of their artificially low prices with the necessarily higher prices of full-investment competitors as evidence of market power.

Nor would it be of any genuine significance if, as respondents now contend, some Kodak equipment customers have difficulty estimating how much service will cost them over the life of the equipment. Brief in Opposition at 14-15. The same imperfect information claim was rejected in *Jefferson Parish*, 466 U.S. at 27-28. Moreover, there is no evidence that Kodak is able to exploit the alleged ignorance of unsophisticated customers. To the contrary, Kodak must and does price its products to appeal to all of its customers, including its many highly sophisticated customers, J.A. 194-95, L001-039, and that is what sets Kodak's maximum package price.[9]

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[9] It is an accepted economic principle that unless a seller has some means of segregating its customers according to the value they place on the seller's goods, (*i.e.*, according to their relative elasticities of demand or reservation prices), it cannot engage in price discrimination. F.M. Scherer, *Industrial Market Structure and Economic Performance* 315 (2d ed. 1980). In such a case, the seller must set its price equal to the lowest reservation

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In short, no market is perfect; nor do all buyers ever have perfect information. But the markets in which Kodak competes are not so imperfect that basic economic realities are suspended.

C. A Post-Sale "Lock-In" is Not a Substitute for Interbrand Market Power.

To find a substitute for actual market power, the Ninth Circuit majority next turned to its own decision in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1342 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985), which held that tying market power can be enhanced if a seller's existing customers are "locked-in" to its product. Pet. App. 8A, 11A. The majority never explained how *Digidyne* applied to this case, other than to refer to respondents' contention that in isolated instances "some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems." *Id.* at 11A. There is no basis in principle or fact for the application of a lock-in theory in this case.

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price of the customers it seeks; otherwise it will lose their business. Therefore, to the extent that better informed consumers would value Kodak's "overpriced" products less, *i.e.*, would have lower reservation prices, they protect less informed consumers by forcing Kodak to lower prices. *See* Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630, 638 & n.16 (1979) ("consumers who search [for information] benefit consumers who do not").

Digidyne has been roundly criticized and expressly rejected by several courts.[10] At the core of this persistent criticism is the Ninth Circuit's failure to recognize — in both *Digidyne* and this case — the effect that a post-sale lock-in strategy would have on new and repeat product sales. A lock-in strategy works only if Kodak can make more total profit by overcharging its existing customers for service than it will lose as its new and repeat product sales dry up. *See* Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. at 21 ("the central prerequisite for a successful tie-in" is that the profits from the tied product must exceed the profits sacrificed by lessening demand for the tying product). That is impossible where the effect of a tie is to increase the price of a product sold in a competitive market, such as the equipment markets

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[10] *See, e.g., A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *Town Sound & Custom Tops, Inc. v. Chrysler Motor Corp.*, 743 F. Supp. 353, 362-63 (E.D. Pa. 1990); *Tominaga v. Shepherd*, 682 F. Supp. 1489, 1495 (C.D. Cal. 1988); *see also* Note, *Tying Arrangements and the Computer Industry: Digidyne Corp v. Data General Corp.*, 1985 Duke L. J. 1027 (1985). Indeed, another panel of the Ninth Circuit criticized and narrowly interpreted *Digidyne* in *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 n.4 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988). Moreover, Justices White and Blackmun of this Court would have granted *certiorari* in *Digidyne* to address, among other issues, "what constitutes forcing power in the absence of a large share of the general market" and "whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase." *Data General Corp. v. Digidyne Corp.*, 473 U.S. 908, 909 (1985) (White, J. and Blackmun, J., dissenting from denial of *certiorari*).

in which Kodak competes. Judge Posner recognized this in *Sterling*, where he described a similar strategy as "a short-run game, since as soon as word [of the tie-in] got out no one would buy Sterling motors." *Sterling*, 866 F.2d at 236 (Posner, J., dissenting).

Overcharging for service is an especially implausible strategy for Kodak, since demand for Kodak service is itself ultimately dependent on new equipment sales. J.A. 162, 180. In economic terms, demand for service is a "derived demand." *See* G. Stigler, *The Theory of Price* 242 (3d ed. 1966). If demand for new Kodak equipment falls, Kodak's installed base of equipment will be reduced, and demand for service will decline. Excessive service pricing therefore has not only the primary effect of reducing new and repeat product sales, but a secondary effect of reducing future service sales and the revenues that would follow from them. J.A. 162.[11] It is inconceivable that the adverse effects of such a strategy on Kodak's long term profitability would be outweighed by any short term profits Kodak might be able to obtain. Thus, as noted earlier, the undisputed evidence is that Kodak prices its service contracts to protect its new equipment sales. J.A. 162, 180.

Even if it were viable, the lock-in theory does not apply here. Unlike plaintiffs in *Digidyne*, respondents offered no explanation as to how or why Kodak

[11] In addition, respondents' theory requires that competing equipment vendors permit Kodak's customers to remain ignorant and do not attempt to increase their own sales by publicizing Kodak's post-sale practices. Sellers in a competitive market would do precisely the opposite.

customers are locked-in in any meaningful sense.[12] Rather, as Judge Schwarzer observed, the evidence here is merely that "customers who have purchased Kodak equipment in a competitive market will tend to retain that equipment for its economic life." Pet. App. 34B. That is true in all markets, and cannot be the basis for an exception to the requirement of actual market power.[13]

D. The Market Power Issue was Appropriately Addressed on Summary Judgment.

The Ninth Circuit acknowledged that Kodak lacked market power in the interbrand equipment market, and that respondents had neither conducted their own market analysis nor presented evidence of specific market imperfections that would permit supercompetitive pricing in an aftermarket. Pet. App. 10A. Nonetheless, contending

[12] In their initial response to Kodak's summary judgment motion, respondents claimed that owners of micrographics equipment (not copiers) faced a technological lock-in due to incompatibilities between competinq brands of micrographics equipment. J.A. 354-57. Kodak responded with evidence that its products conformed to industry standards that precluded such incompatibilities. J.A. 707-10; L188-209. Respondents have not raised the issue since then, relying instead on the concept of post-purchase depreciation typical of all durable goods.

[13] *Digidyne* is inapposite for another reason. In that case the Ninth Circuit found that the defendant had point-of-sale market power, and held only that the lock-in enhanced that power. *Digidyne*, 734 F.2d at 1343. Indeed, *Digidyne* appears to accept the logic of the point that is relevant here: that, in the absence of point-of-sale market power, consumers will avoid purchasing products from manufacturers that engage in post-purchase anticompetitive practices. *Id.* at 1342.

that "a requirement that they do so in order to withstand summary judgment would elevate theory over reality," it reversed the District Court. *Id.* That decision fundamentally undercuts the role of summary judgment in antitrust litigation, and in litigation generally.

First, the Ninth Circuit's decision ignores this Court's mandate in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986), that the opponent of summary judgment must "set forth specific facts showing that there is a genuine issue for trial." Respondents never carried that burden. The majority acknowledged they had not, yet reversed anyway on the ground that there was a theoretical possibility that Kodak had tying market power. That was error. The burden to set forth specific facts means that an antitrust plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. A theoretical possibility of a material dispute is plainly insufficient.

Respondents' evidence was especially deficient in light of the inherent implausibility of its aftermarket power theory. In *Matsushita*, this Court held that if the factual context of an antitrust claim "renders the claim implausible — if the claim is one that simply makes no economic sense — [plaintiffs] must come forward with more persuasive evidence than would otherwise be necessary" to defeat summary judgment. 475 U.S. at 587.[14]

[14] Specifically, *Matsushita* rejected an expert's opinion that the alleged conspirators had depressed prices and sold goods at substantial losses. 475 U.S. at 594 n.19, 601-03. The Court found that the expert's evidence of below-cost pricing had

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This principle arises from the *Matsushita* rule that "antitrust law limits the range of permissible inferences from ambiguous evidence." 475 U.S. at 588. As Justice (then-Judge) Kennedy explained in *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987):

> Where a party asserts there is a genuine issue for trial . . . its argument is measured by the underlying theory of the claim or defense being considered. . . . [If] the substantive law is the law of antitrust, and if the claim makes no economic sense, a speculative inference from the jury will not help it. In such an instance, the record on summary judgment must contain further persuasive evidence if it is to support the claim.

Accord Eichman v. Fotomat Corp., 880 F.2d 149, 161 (9th Cir. 1989). *See also Mid-State Fertilizer Co. v. Exchange Nat. Bank of Chicago*, 877 F.2d 1333, 1338-40 (7th Cir. 1989); *Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 45 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987). In short, evidence that might otherwise permit a plaintiff to survive summary judgment will not save a plaintiff whose claims make no economic sense.

The *Matsushita* standard applies in this case. Reduced to its essentials, respondents' theory is that a firm which faces vigorous competition and concededly lacks interbrand market power nonetheless can earn supercompetitive profits. For all the reasons previously discussed, that "simply makes no economic sense." *Matsushita*, 475 U.S.

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"little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational." *Id.* at 594 n.19.

at 587. Courts should never be required to send such inherently implausible antitrust claims to juries. However, if they must, the plaintiffs should at least be required to prove under the standard announced in *Matsushita* that there is specific reason to believe that normal economic reasoning does not apply. They should not be entitled to the presumption afforded to respondents that there is a triable issue whenever unsubstantiated doubts exist.[15]

The Ninth Circuit's decision further undercuts this Court's teachings in *Matsushita* to the extent that it mandates, as respondents imply, extensive discovery in all antitrust cases. The dispositive fact in this case, Kodak's lack of market power in the interbrand equipment markets, was conceded. Respondents' request for "full discovery," whatever that means, is therefore pointless.[16] There is nothing that respondents could prove that

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[15] Respondents point to the declaration of Paul Hernandez, president of one of respondent companies, as evidence of market imperfections. His testimony, however, was conclusory hearsay, lacking any foundation, as Kodak pointed out below. Record No. 46 at 7. Such inadmissible testimony cannot suffice to prevent summary judgment in any case. *See* Fed. R. Civ. Proc. 56(e) (opposition to well-grounded summary judgment motion must be supported by admissible evidence); *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988); *Keebler Co. v. Murray Bakery Prod.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989). It should not be allowed to do so here, where respondents' claims make no economic sense.

[16] Summary judgment need not await the completion of boundless "full" discovery. To the contrary, a requirement that antitrust litigants spend months, if not years, and hundreds of thousands, if not millions, of dollars establishing market facts

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would overcome Kodak's conceded lack of market power. *See Anderson*, 477 U.S. at 248 ("[f]actual disputes that are irrelevant or unnecessary" do not preclude summary judgment).

Moreover, the record below is hardly "sparse," as respondents contend. Respondents' Supp. Brief in Opp. to *Cert.* at 10. Kodak responded to broad-written discovery from respondents, J.A. 255-325, and respondents took several depositions of Kodak management personnel. They thereafter requested additional discovery, and Judge Schwarzer instructed them to take two more depositions, focused on the market power issue. Pet. App. 36B-37B. Finally, when respondents sought relief under Rule 56(f) of the Federal Rules of Civil Procedure in their opposition to summary judgment, as Judge Schwarzer told them to do, Pet. App. 37B, they merely made a conclusory assertion that with further (unspecified) discovery, they could support "each of the facts stated" in their Memorandum of Points and Authorities. J.A. 527.[17]

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that are *conceded* would chill efficient business conduct. District Courts must maintain the ability to frame efficient, limited discovery plans. *See First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253 (four depositions and limited document discovery were sufficient discovery in antitrust conspiracy case), *reh'g denied*, 393 U.S. 901 (1968).

[17] Respondents also alleged that two ISO customers had refused to sign truthful affidavits, unsigned copies of which respondents attached to their opposition papers. J.A. 535-42. The statements contained in the affidavits, however, even if true, had nothing to do with Kodak's lack of market power and, thus, would not help respondents avoid summary judgment. *See Willmar Poultry Co. v. Morton-Norwich Products, Inc.*,

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Judge Schwarzer, whose expertise in the field of summary judgments is well known to this Court,[18] properly determined that respondents' attempt to invoke Rule 56(f) was fatally deficient because they failed to disclose "what additional discovery may be needed or how it may help plaintiffs cure the fatal deficiencies in their case." Pet. App. 37B; *see Cities Service*, 391 U.S. at 297-98 (party appropriately denied further discovery under Rule 56(f) where application did not show that additional discovery would be helpful to defeat summary judgment).

The summary judgment granted in this case was substantively sound and procedurally fair. Kodak's conceded lack of market power was, and is, dispositive.

II. The Ninth Circuit's Decision Improperly Extends the Essential Facilities Doctrine.

The Court need not address respondents' monopolization claim under Section 2 of the Sherman Act except to

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520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976) (court need not permit further discovery where it will not help defeat summary judgment); *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990) (same).

[18] Judge Schwarzer's writings on summary judgment have been cited on numerous occasions by this and other courts. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), *citing* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984); *see also TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 684 (9th Cir. 1990); *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986).

recognize, as discussed above, that interbrand equipment competition precludes any finding of monopoly power in derivative aftermarkets. That alone is sufficient to support summary judgment.[19] However, the majority's discussion of Section 2 is erroneous on three additional grounds. First, it improperly holds that "Kodak service" could be a distinct relevant market which Kodak could monopolize. Second, it misapplies this Court's decisions regarding the essential facilities doctrine by holding that Kodak brand replacement parts could be essential facilities. Third, it improperly rejects as a defense undisputed business justifications for Kodak's practices.

A. "Kodak Service" is Not a Relevant Market.

In *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 393 (1956), this Court rejected the notion that the relevant market in an antitrust case could be limited to one brand of a product or service:

> [O]ne can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must

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[19] The majority conceded that it had "more trouble" with the question of monopoly power, which "is not as easily answered" as the question of market power. Pet. App. 18A-19A. But without any further evidence, much less further analysis, the majority simply assumed its own answer and concluded that a triable issue exists as to monopoly power. Pet. App. 19A.

be appraised in terms of the competitive market for the product.

This principle has been faithfully followed in numerous decisions rejecting proposed definitions of the relevant market limited to a single-brand product or its components, such as service. *See, e.g., General Business Systems*, 699 F.2d at 975; *Mozart*, 833 F.2d at 1346-47; *Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622, 623-24 (1st Cir. 1984); *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 571 (6th Cir. 1981); *Spectrofuge Corp. v. Beckman Instr., Inc.*, 575 F.2d 256, 286 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 919 (10th Cir.), *cert. dism'd*, 423 U.S. 802 (1975). For example, in *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972), the Ninth Circuit affirmed the dismissal of a claim that a manufacturer of dictating machines had monopolized a market limited to the service of its own products where there was no evidence that defendant "dominated the market for office dictating machines generally."

The Ninth Circuit in this case assumed there could be a single-brand service market and, without citing any evidence, held there were triable issues as to whether Kodak had monopoly power in it. Pet. App. 18A-19A. That assumption was error. Single-brand service markets are, by definition, derivative of the markets for the equipment requiring service. For all the reasons discussed previously, they cannot be monopolized, in any sense that harms consumers, unless the equipment manufacturer has equivalent monopoly power in the interbrand equipment market. *See* pp. 16-27, *supra*. Respondents promote the notion of a single-brand service market because it

provides a colorable rationale to ignore, as "outside the market," the restraining effects of interbrand equipment competition. But interbrand competition cannot be ignored; it is the "primary concern" of the antitrust laws. *GTE Sylvania*, 433 U.S. at 52 n.19. To preserve the principle established in *duPont*, the Court should hold as a matter of law that there can be no claim for monopolization of a single-brand service market.

B. Replacement Parts are Not Essential Facilities.

The majority acknowledged the general rule that even a monopolist has "no duty to deal with its competitors." Pet. App. 16A; *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). However, it held that Kodak might fall within an exception to that rule, because "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications."[20] Pet. App. 16A-17A.

Prior to this case, no court had ever held that a single manufacturer's brand-name replacement parts may constitute an "essential facility" that it must share with its competitors. That result cannot be squared with this Court's decisions in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973), or *Aspen Skiing Co. v. Aspen*

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[20] As the majority conceded, respondents did not raise this argument in the District Court. Pet. App. 16A n.7. But the majority nonetheless proceeded to decide it based on its reasoning that the District Court might somehow have considered the issue anyway. *Id.* That decision was improper. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

Highlands Skiing Corp., 472 U.S. 585 (1985), upon which the Ninth Circuit purported to rely.

Both *Otter Tail* and *Aspen* are limited decisions which do not, under any reading, establish general duties to deal with competitors. In *Otter Tail*, the Court was faced with a natural monopoly, a regulated electric utility, that refused to "wheel" power to competing municipal utilities. The defendants' power lines were deemed to be an essential facility because competitors could not feasibly duplicate them, as much for regulatory as economic reasons. *Id.* at 377-78. As Professor Areeda has noted, *Otter Tail* turns on these peculiar facts: "*Otter Tail* is very limited. Not only was the defendant a natural monopolist, it was regulated and its activities may have evaded that regulation, to the prejudice of consumers." Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 848 (1990).

Aspen is not even an essential facilities case; this Court expressly declined to consider plaintiff's essential facilities claim and instead addressed the termination of a joint marketing arrangement unlike anything in this record. 472 U.S. at 611 n.44. In *Aspen*, the defendant was a conceded monopolist, 472 U.S. at 596, that had for sixteen years participated in a presumptively efficient joint marketing arrangement with a competitor. *Id.* at 604-07 and n.31. Then, without "any efficiency justification whatever," it terminated that arrangement. 472 U.S. at 608. The jury found, and the Court agreed, that the defendant had acted with the "specific intent to drive [plaintiff] from the market by means other than superior efficiency." *Id.* at 608 n.39. Thus *Aspen* holds, at most, that a monopolist may violate Section 2 by terminating, without any efficiency

justification, a long-standing and efficient cooperative relationship necessary for the preservation of a competitive market.

By contrast to *Otter Tail* and *Aspen*, Kodak is not a monopolist in any relevant market; it has no natural monopoly; there is no danger that it is evading regulation; it had no long-standing cooperative relationship with respondents; and there is no evidence whatever that it acted with the intent to exclude competition on a basis other than greater efficiency. To the contrary, its quality control business justification was undisputed. *Otter Tail* and *Aspen* therefore do not apply.

There is no basis in principle for extending the essential facilities doctrine to Kodak's control over Kodak brand replacement parts. For a competitive asset to be deemed so "essential" that it must be shared, it must be impractical to duplicate by equally efficient competitors. *See, e.g., United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 405 (1912) (bridge that could not be duplicated); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (local telecommunications facilities that were franchise monopolies); Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"*, 74 Va. L. Rev. 1069, 1073 (1988); *see also* Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L. J. 209 (1986). Kodak replacement parts are not impractical to duplicate. In fact, nothing in this record suggests any reason why respondents cannot obtain replacement parts on their own. Respondents claim that 90% of all Kodak

replacement parts are made outside Kodak. J.A. 740. They concede they can buy many parts from OEMs, just as Kodak does. J.A. 740. They also can and do disassemble used equipment for parts. The truth is that respondents simply do not want to go through the trouble and expense of investing in parts stocks as Kodak and other full-investment competitors have. They prefer to have Kodak procure and stock parts for their benefit, *i.e.*, to free ride. Nothing in this Court's essential facilities cases requires Kodak to assist that endeavor.

C. Kodak's Conceded Business Justifications Preclude Section 2 Liability.

This Court has recognized that even a monopolist's conduct cannot be branded unlawful if it has a legitimate business justification. *Aspen*, 472 U.S. at 608-10 (conduct lawful if product of a "normal business purpose"); *Grinnell*, 384 U.S. at 570-71. This principle is firmly ingrained in Ninth Circuit monopolization cases, *e.g.*, *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 368 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988) (a monopolist's duties under Section 2 "arise only when there is no justification for refusing to aid a competitor"), and the majority repeated it. Pet. App. 16A-18A. But then it brushed aside each of the three business justifications Kodak had for its conduct: promoting high quality service, reducing inventory costs, and eliminating free riding. *Id.*; *see* pp. 5-8, *supra*. The majority found that Kodak's first two business justifications might be "pretextual" and not "genuine," and it held as a matter of law that not wanting to promote free riding was an illegitimate business justification. Pet. App. 17A-18A; *see also id.*

at 12A-14A (rejecting Kodak's business justifications in the context of respondents' tying claims).

As Judge Wallace noted in dissent, there was absolutely no evidence suggesting that Kodak's high-quality service strategy was in any way pretextual. Pet. App. 25A ("Kodak submitted extensive and undisputed evidence of a marketing strategy based on high-quality service"). The only evidence cited by the majority was respondents' claim that Kodak first refused to sell one ISO parts shortly after it began bidding against Kodak. Pet. App. 13A-14A. Even if that is true, it is not inconsistent with Kodak's high-quality service strategy. As discussed above, selling parts to ISOs undercuts Kodak's strategy, and, accordingly, it tries not to sell them parts.[21] Moreover, as Judge Wallace noted, it does not matter whether or not Kodak may have had some "monopolistic" motivations along with its legitimate business justifications: "[T]he desire to maintain market power -- even a monopolists' [sic] market power — cannot create antitrust liability if there was a legitimate business justification for [the challenged action]." Pet. App. 27A. *See also Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1109-13 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986).

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[21] Previous decisions of the Ninth Circuit have held that a quality control justification is sufficient to preclude Section 2 liability. *See, e.g., Mozart*, 833 F.2d at 1350-51, 1352; *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.), *cert. denied*, 475 U.S. 1087 (1986).

The majority's focus on whether Kodak was subjectively motivated by anticompetitive intent and whether Kodak's quality control business justification was "genuine" therefore misses the point. Most lawful, procompetitive business practices are by definition designed to take business from competitors. To make motivation the test of liability would inevitably chill those lawful practices. Thus, it has "become an antitrust commonplace . . . that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Olympia*, 797 F.2d at 379. *See also* III P. Areeda & D. Turner, *Antitrust Law* ¶ 626 at 76 (1978).

Finally, it was error for the majority to reject as a legitimate business justification Kodak's desire not to promote free riding. This Court squarely held in *GTE Sylvania* that free riding is a market imperfection that a manufacturer may legitimately take steps to eliminate — even through combinations and conspiracies that might otherwise violate Section 1 of the Sherman Act. *GTE Sylvania*, 433 U.S. at 55; *Monsanto*, 465 U.S. at 762-63. Kodak, acting unilaterally, should be able to do the same. That this conduct may be exclusionary -- by excluding free riders — is beside the point. The free rider's option is to make the same investments as its competitors, not to seek protection (and treble damages) from antitrust courts.

III. The Ninth Circuit's Decision Hinders Innovation and Frustrates Competition.

Kodak's practices do not violate the antitrust laws because they cannot harm competition. To the contrary,

Kodak's practices are dictated by and promote interbrand competition. Kodak's innovative equipment offerings, which are the sole basis for respondents' business existence, have given copier and micrographics equipment users more and better choices in a robust marketplace. Kodak's ability and desire to develop new equipment is enhanced by its freedom to select parts and service strategies that it believes will support those products. The antitrust laws operate to preserve that freedom, not restrain it. If a company that innovates and creates a new product is compelled to surrender the fruits of that innovation to others, "success would yield not rewards but legal castigation," and "[t]he antitrust laws would . . . compel the very sloth they were intended to prevent." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Every manufacturer of sophisticated business equipment faces the same situation as Kodak. As it decides whether or not to devote resources to innovative equipment, the manufacturer must consider its freedom to develop marketing plans, including high-quality service strategies, that will allow it to compete effectively. Manufacturers in highly competitive industries should not have to worry that antitrust courts will second guess their strategies, or even that they will have to go to trial to be vindicated. That is why summary judgment is so important in this case. Reinstating the summary judgment entered by Judge Schwarzer will remove the chilling effect that the threat of protracted litigation has on even the most laudable competitive behavior. It will reaffirm that the antitrust laws are designed to protect competition, not competitors, and to promote innovation and

freedom of choice by firms, like Kodak, that face vigorous competition.

CONCLUSION

The Ninth Circuit's decision should be reversed and the summary judgment in favor of Kodak granted by Judge Schwarzer should be reinstated.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICE, INC.; J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, d/b/a G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICE, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, INC., d/b/a MICRO IMAGE; MIDWEST MICROFILM EQUIPMENT & SERVICES, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Is it per se lawful for a manufacturer facing some competition for basic equipment sales to monopolize aftermarkets for parts and service of its machines and for its used equipment, or to tie sales by using market power in one aftermarket to restrain competition in a second?

2. Is there sufficient evidence in the record to raise as a triable issue whether Kodak has market power in certain markets for new copier and micrographic equipment?

3. Is there sufficient evidence in the record to raise as a triable issue whether Kodak (a) monopolized the aftermarkets for parts and service for Kodak equipment in violation of Section 2 of the Sherman Act, and (b) unlawfully tied service to parts to foreclose ISOs and unreasonably to restrain competition in violation of Section 1 of the Sherman Act?

LIST OF PARTIES AND STATEMENT UNDER RULE 29.1

All parties are set forth fully in the caption. The eighteen Respondents have no corporate parents and no subsidiaries other than wholly-owned subsidiaries.

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STATEMENT OF THE CASE

A. Introduction.

The version of the facts presented by Eastman Kodak Company ("Petitioner" or "Kodak") ignores most of the evidence presented below by Image Technical Service, Inc. ("ITS") and the seventeen other plaintiffs ("Respondents"). It is undisputed that, prior to the initiation of Kodak's restrictive program, independent service organizations ("ISOs") engaged in effective competition with Kodak to service Kodak copier and micrographic equipment and to sell used Kodak machines and that, thereafter, ISOs were largely driven from these markets. Even the minimal discovery permitted by the district court showed that Kodak had power in three basic equipment markets, and that Kodak acted in concert with others (i) to monopolize a market for Kodak parts, (ii) to use that monopoly to cut off the essential parts supply to ISOs and independent enterprises which previously supplied ISOs, and (iii) to restrain competition in markets for Kodak photocopier and micrographic service and used machines.

As various amici have pointed out, this case implicates a wide range of expensive, high technology, basic equipment products. Automobiles were the first and remain the best example. Automobile owners are free to buy competing brands of parts made by independent parts manufacturers even though automobile manufacturers prefer that customers use only authorized replacement parts. Similarly, independent garages vigorously compete with each other and with authorized dealer/service agencies in the automobile service market.

The consequence of adopting Kodak's rule of per se legality, permitting a manufacturer facing some competition in the sale of its basic equipment to control parts and

service for its output, regardless of the means employed and their anticompetitive effects, would be to reduce competition in the major and growing equipment service segment of the U.S. economy. In most markets today, ISOs compete with each other and basic equipment manufacturer-controlled service organizations. Under the new order Kodak seeks, however, ISOs would exist only at the whim of basic equipment manufacturers. Service for copiers and micrographic equipment would be available only from manufacturers. Corner garages would provide service and repair only if auto manufacturers allowed it. The result would be the same in many other industries. As a consequence, service markets would become more concentrated. Consumers would be left with fewer choices, lower quality and higher prices.

B. The Parties and the Markets.

Respondents are small businesses located in ten states. They repaired and serviced Kodak copiers and/or micrographic equipment ("Kodak Equipment"), sold parts for Kodak Equipment, and reconditioned and sold used Kodak Equipment until Kodak began refusing to supply needed parts.[1]

Respondents' principal customers were federal, state and local government agencies, such as the Internal Revenue Service, U.S. Department of Agriculture, U.S. Veterans Administration, State of California, and Harris County Clerk's Office;[2] and banks and insurance

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[1] *See, e.g.*, Joint Appendix ("JA") 411, 449, 462, 470-71, 504.

[2] JA 487; Documents lodged with Clerk by Petitioner with the filing of the JA ("L") 165; L 149-50; JA 492-93.

companies, such as the Commercial Trust Company, Colorado Student Loan Program, State Farm, and Blue Cross and Blue Shield of Minnesota. JA 540-41, 501, 488. Some customers were major industrial enterprises, such as Dow Chemical, Mobil Oil, Pennzoil, Bechtel Corporation and Burlington Northern Railway; some were providers of specialized copy and microfilming services to the public (all of the preceding referred to generally as "Service Customers"). JA 492-93, 488. Some Service Customers purchased their own parts and hired ISOs to perform maintenance and repair using them. L 144-45. Others chose ISOs to supply both parts and service. L 133.

The two broad equipment industries at issue are copiers and micrographics. JA 10-11. Kodak manufactures, markets, sells and services a wide variety of photocopier and micrographic equipment. It also markets and sells supplies and parts for them. The photocopy industry is divided into three product markets: (1) high volume copiers with machine speeds in excess of sixty copies per minute; (2) mid-volume copiers with machine speeds of between twenty-five and sixty copies per minute; and (3) low-volume copiers with machine speeds of less than twenty-five copies per minute. JA 175-76, 198. The micrographics industry is divided into at least four product markets.[3] The geographic market for each of the basic equipment markets and the aftermarkets is the United States.

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[3] These are: (1) capture products (microfilmers and electronic scanners); (2) retrieval products (microfilm viewers and viewer/printers); (3) systems products (computer assisted retrieval systems (or "CAR systems") that provide access to stored data); and (4) computer output microfilm recorders (or "COM recorders") ("data processing peripherals that record computer generated data onto microfilm"). JA 156-58.

C. Kodak Changed its Longstanding Policy of Allowing Parts to be Sold Freely to ISOs.

Prior to December, 1985 Kodak stated the following policy in its parts catalog:

> Kodak distributes parts throughout the world and does not rely upon dealers, agents, or distributors in the U.S. to perform this distribution function. Therefore, Kodak will sell replacement parts *to any party* who intends to use them to repair Kodak Equipment. Orders will be accepted only from the customer to be billed.

JA 435 (emphasis added). In fact, Kodak imposed no restrictions on the sale of Kodak parts during this time.

With respect to copier parts, notwithstanding its own published policy statement, by 1987 Kodak was saying that its real policy, "unchanged since 1975," was not to sell copier parts to ISOs. JA 185. Kodak fails to offer contemporaneous supporting documents. There is additional contrary evidence in the record. Kodak specifically told Paul Hernandez in 1984, when he was considering starting Respondent ITS, that he would have no problem buying parts for Kodak copiers directly from Kodak. JA 415-16. Subsequently, a Kodak official warned an ISO owner that "Kodak *would be* taking action to put [ISOs] out of the Kodak business." JA 517 (emphasis added); and a Kodak employee denied copier parts to a former purchaser of such parts based on "our current business practice" not to sell such parts (L 157).

With respect to micrographic parts, Kodak admits that prior to mid-1985 it had an open sales policy, and that thereafter this policy changed. JA 99-100, 152.

Kodak did not seek to prevent ISOs from competing in the markets for Kodak service or used Kodak Equipment until well into 1985. JA 449-50, 470 *et seq.* However, Kodak then changed its longstanding policy to one of foreclosure.

D. Kodak Changed its Policy in 1985.

Kodak characterizes its policy as a "unilateral refusal to deal" with ISOs. Petitioner's Brief ("Pet. Br.") 15. In fact, it was much more: it involved an extensive range of conspiratorial action with third parties to prevent enterprises other than Kodak from providing parts to Respondents.

In 1985, ISOs had four non-Kodak sources of parts for Kodak Equipment: (1) independent original equipment manufacturers ("OEMs"); (2) brokers; (3) customer intermediaries who bought parts from Kodak and made them available to third parties such as ISOs; and (4) used equipment stripped for parts. Kodak sought control of these sources to drive competing ISOs out of business.

Kodak disingenuously says that ISOs are free to buy Kodak parts from others, just not from Kodak. Pet. Br. 37-38. After Kodak implemented its foreclosure policy, that became virtually impossible.

1. Kodak and Independent Manufacturers of Kodak Parts Agreed not to Sell to ISOs.

Kodak now concedes that 90% of parts for Kodak Equipment are made to Kodak's order by OEMs. Pet. Br. 37-38. Kodak also concedes that it totally controlled the supply of OEM parts. JA 120. Kodak says it did not tell OEMs they could not sell parts to ISOs. However, an internal Kodak memorandum reports that at least some OEMs required Kodak's approval to sell to ISOs, and this approval was refused. L 150. In addition, ISOs who sought to buy parts directly from OEMs were told that was impossible because of existing restrictive arrangements the OEMs had with Kodak. JA 429, 468, 474, 496. ISOs unsuccessfully attempted to buy parts from Acme

Electronics, Barber Coleman Company, Sola Electric (JA 429); Merkle Motor Company, Bodine Electric Company (JA 468); and Pittman Company (JA 496).[4]

Kodak "does not manufacture replacement parts to be used as components of other manufacturers' finished products." JA 432, 442. Reciprocally, Kodak Equipment is not designed to use parts manufactured or sold by its basic equipment competitors for their own equipment. Therefore, Kodak's concerted action with OEMs effectively eliminated ISOs' access to the primary alternative parts sources.

2. Kodak Pressured Independent Customers not to Sell Parts to ISOs.

When an owner of Kodak Equipment wanted to purchase parts sometime after it had bought the new equipment, Kodak required it to agree in writing "that the parts that you purchase from Kodak Parts Service will be used only to service the unit identified above." L 178; *see also* JA 590. Kodak threatened not to sell parts to Service Customers who resold them to ISOs. JA 428-29.

3. Kodak Pressured Parts Brokers and Their Agents not to Sell Kodak Parts to ISOs.

Independent parts distributors, or brokers, also sold parts to Service Customers and ISOs in the mid-1980s. These distributors would buy parts from Kodak or others who purchased parts from Kodak, or strip used Kodak

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[4] Kodak refused in discovery to disclose what it later conceded – its lack of proprietary rights to prevent others from selling to ISOs most parts which fit Kodak equipment. JA 293; Pet. Br. 37. This type of non-responsiveness limited the value of what little discovery was permitted.

Equipment to obtain the useful parts. JA 415-16, 99, 517; L 169; Pet. Br. 38.

Kodak adopted an aggressive campaign to prevent these distributors from selling parts to ISOs. In August 1986, Kodak told a San Jose State University employee that it would not service any Kodak Equipment the University purchased from an independent broker. JA 512. A Kodak internal document dated July 8, 1987, states that Kodak is "not obligated to sell [an equipment customer] parts" if it believed the parts would be used to "support" Kodak Equipment purchased from a broker. L 143; *see also* L 140. The document also states that it would be appropriate to cut off the customer to starve the brokers, whether or not the customer is an ISO or is suspected of selling parts to or obtaining service from ISOs. In addition, Kodak used its private security force to seize shipments of suspected grey or black market parts possessed by others without authority. *See, e.g.* JA 517-18.

4. Kodak Effectively Closed the Used Machine Market as a Parts Source.

Stripped, used Kodak machines were a fourth potential non-Kodak source of Kodak parts in the 1980s. L 169; Pet. Br. 38. Among the steps Kodak took to restrict the availability of used machines were the following:

a. It bought used machines, in one case 33 copiers from RCA, and scrapped them to keep them out of the market. JA 511. Kodak also demanded the right of first refusal to repurchase used machines from leasing companies after the leases expired. JA 510.

b. It refused to service some used machines acquired by customers who wanted Kodak service. JA 423.[5]

c. It charged a mandatory pre-installation inspection fee before agreeing to service some used machines purchased from brokers, even on a per-call basis where the used machines were operating smoothly. *See* L 93-94. This fee was often almost as much as the price of the used Kodak copiers. Lynn Gleason, a Kodak Customer Technical Service specialist, testified that during the time Kodak implemented its new restrictive policy, this fee for Ektaprint 100 and 150 copiers went from $250 to $1,500 – a six-fold increase in two years. JA 650.

5. Kodak Forced Service Customers to Boycott ISO Service and Used Equipment.

Kodak tied continued access to Kodak parts to each parts customer's agreement to boycott ISO service and ISO used equipment. L 163; JA 428-29; L 140.[6] In addition, if ISOs wanted to buy Kodak parts from Kodak, the only practicable parts source by 1987, they had to stop servicing any Kodak Equipment other than their own. L 143, 159.

Kodak also told Service Customers identified as dealing, or likely to deal, with ISOs, that ISOs could no longer

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[5] Kodak told a prospective customer that it would not sell it parts if its machine was purchased from a broker and self-serviced by one of its own employees. L 138. This is contrary to Kodak's assertion that it permits customer self-service. Pet. Br. 3; JA 171-72, 442.

[6] On some occasions Kodak did allow a few customers to purchase parts to be installed by ISOs, L 145, but this was the exception rather than the rule, *e.g.*, L 163, and is an issue for trial.

obtain parts to service machines. For example, in January 1987, Kodak's Denver District Sales Manager, Jack Murray, told the Treasurer of Adams County, Colorado that:

> He should not turn his equipment maintenance over to B.C.S. Technical Services [an ISO], because [it] could not get parts from Kodak. Mr. Murray did not mention parts delays, but simply said [B.C.S.] could not get parts at all. JA 466.

6. Monopolizing Parts was a Key to Monopolizing Service.

Kodak's new policy focused on monopolizing the Kodak parts market. Once the source of parts was controlled, the Kodak service market could be monopolized by denying parts to ISOs. An internal Kodak document, L 180, speaks for itself:

> Several fairly reliable sources from the field have recently mentioned that there are third parties repairing Kodak copiers. There are no legitimate channels for obtaining parts, yet good service is apparently being provided because of an adequate supply of Kodak parts. No one that I have talked to knows the source of the parts. We are concerned, as I'm sure you are too, about third party service nibbling away our profits. . . . *See also* L 187.

Kodak's refusal to deal directly with ISOs became lethal once other sources of Kodak parts had been significantly foreclosed and, consequently, high barriers to new entry by independent service providers had been erected.

E. Kodak did not Disclose to Buyers of Kodak Equipment That it was Restricting Competition in Aftermarkets; Buyers Lacked Alternative Information Sources.

The court of appeals, relying on Kodak's brief, stated that Respondents conceded that new equipment purchasers consider the cost of parts and service when initially deciding between Kodak's and its competitors' equipment. Petition for Writ of Certiorari ("Pet. App.") 8A. That is not so.[7]

The Ninth Circuit quoted the post-1985 Kodak "Terms of Sale" restricting parts sales to those "who service only their own Kodak equipment." Pet. App. 15A. This document was the Terms of Sale for parts, not for basic equipment. The parts sales terms were not disclosed when the customer purchased new Kodak Equipment.

[7] *See* Kodak's brief, JA 823, purporting to rely on Respondents' brief at JA 779-80. Respondents' brief below did not even discuss whether such information is available, much less whether it is actually considered by buyers prior to purchase. Respondents disagree with two other statements in the opinion below. Specifically, contrary to the opinion, evidence *was* offered that Kodak's post-1985 micrographic parts policy as to pre-1985 machines was in fact exclusionary (L 125), and Respondents did *not* concede that Kodak lacked market power as to basic equipment. Respondents only referred to Kodak's market power for new equipment twice in their brief to the Ninth Circuit: (1) acknowledging that Kodak was arguing it lacked such power, and (2) arguing that Kodak's lack of market power would not foreclose Respondents' claims. The Solicitor General says that facts which the court of appeals considered undisputed, presumably including facts contained in the record, are not properly before this Court. That is wrong. The standard for summary judgment is based on what the record contains, not what any particular judge or panel thinks the record contains or has been conceded. *See* p. 26 below. In any event, these facts in the record were not repudiated or waived.

Kodak's sales and its service/parts ("CESD") divisions are separate. The former deals with new equipment, the latter with parts and service. JA 93, 156, 160-161, 174. A consumer purchasing a Kodak photocopier receives, from the sales division, terms of sale which nowhere mention restrictive parts policies. L 76-100. These policies are only disclosed to a potential parts customer who specifically obtains the "microfiche containing the complete CESD parts list." JA 261-262, 415, 431-447.

Consumers can only consider costs they know. The evidence shows a failure by Kodak or anybody else to disclose to equipment purchasers the lack of competitive alternatives for service, parts and used products for their Kodak machines. They likely expected aftermarket competition from their experience with other high-tech durable products, especially automobiles. As a result, buyers of Kodak Equipment have had no basis for knowing that aftermarkets for Kodak Equipment were or would be any less competitive than they had been prior to 1986. The brochures on which Kodak relies, L 40-58, are not designed to and do not inform customers about the aftermarkets for parts or service. They merely say that Kodak service is the best. L 40-62. One of them does warn that "maintenance . . . is one of the *hidden* expenditures connected to copying equipment." JA 215 (emphasis added). One is openly misleading, touting "readily available parts." L 61.

F. The Anticompetitive Effects of Kodak's Policy.

By 1987, Kodak's attempt to monopolize the service market had largely succeeded. The choices of Service Customers were reduced. Many had to pay more for lower quality service. JA 425-27 (ITS placed one of its technicians on-site for its customer Computer Science

Corporation ("CSC"), which Kodak refused to do, and charged CSC $100,000 while Kodak had charged $200,000); JA 420-22 (ITS was forced to drop service to California's Department of Mental Health and Department of Transportation to which ITS had charged less than one-third Kodak's published prices); *see also* JA 422, 474-75, 482-84, 514.

ISOs were unable to obtain Kodak parts from any reliable source. Many ISOs exited the service business (*see, e.g.*, JA 422, 463), and remaining ISOs have lost substantial revenues and accounts. JA 501-02, 495-96, 458-59. As a direct result, the relevant service markets have become increasingly concentrated – moving from a competitive market structure to a Kodak monopoly, not due to Kodak's "cost effective service" but due to its parts foreclosure. *See* L 107.

G. Kodak's Justifications for Driving ISOs From the Market are Pretextual.

Kodak gives three justifications for its exclusionary practices: (1) ISOs undermined the Kodak image of quality service; (2) not selling to ISOs lowered inventory costs; and (3) ISOs were not entitled to a "free ride" on Kodak's capital investment in equipment, parts and service. Pet. Br. 6. The factual bases of these "justifications" are disputed.

1. Concern With Quality Service is a Pretext.

The documents produced by Kodak show no concern with either the purported poor quality of ISO performance or with the adverse impact of ISOs on the public's perception of the quality and competitiveness of Kodak

Equipment. On the contrary, Kodak's own documents recognize that ISOs have highly accomplished personnel. For example, an internal Kodak memorandum dated October 28, 1986, reports that Kodak more than once found that its equipment maintenance agreements were not competitive with ISO service contracts in California. L 133. One interviewed customer chose ITS over Kodak because ITS provided better service at half the price:

> To date they have received an average of 2 hour response time, no problem with parts, and overall are very satisfied with the quality of service they have been receiving from ITS. They will give us a chance to bid on the EMA at the time of renewal. However, at this point I am not sure we have much to offer. *Id.*

ITS's customer CSC processed medical and dental benefits records for the states of California, Washington and Colorado. CSC replaced Kodak with ITS because ITS was cheaper and willing to place a full-time service representative on CSC's premises during working hours:

> [This] in-house service representative at CSC, and with extra machines at ITS which can replace any 'down machine' at CSC . . . ITS has provided more reliable and substantially more expeditious service than Kodak provided, with much less down time. JA 426.

One would expect Kodak documents to distinguish between good and poor ISOs if Kodak officials were actually concerned about the ISOs' impact on Kodak's quality. They do not. One would also expect Kodak documents to explain how some ISOs were damaging the Kodak image. They do not. Instead, the documents produced focus on how to knock out *all* ISOs to improve Kodak service profits; quality is not a consideration. L 126 *et seq.* Nor are there Kodak documents discussing

how Kodak could compete more effectively with equipment competitors (such as IBM and Xerox) by pricing Kodak Equipment low and Kodak service high; nor are there Kodak documents explaining how Kodak could better service clients or make better products by driving all ISOs out of business.

2. Concern With Inventory Cost Control is a Pretext.

Kodak claims that its new policy was necessary to achieve a reasonable return on parts and that Kodak needed to save money through better control of its parts inventory. Except for self-serving Kodak statements made after-the-fact, the record is to the contrary. Kodak buys 90% of its parts from OEMs and sells them to customers at a substantial mark-up. JA 468, 490, 457-58. Even before the new policy, Kodak charged ISOs significantly more, often twice what it charged its in-house equipment service representatives for the same parts. Kodak's mark-up on parts sold to ISOs, when other sources were still available, was almost twice as high as that of other vendors. JA 457-58, 490.

Contrary to Kodak's contentions, JA 104-05, Kodak's CESD Parts Service had *always* kept replacement parts stocks limited to Kodak's actual machine population. Kodak "maintained [parts] . . . at a level carefully planned to fulfill Kodak's commitments" to regular servicers, self-servicers and Kodak's CESD service. JA 435. The new policy only replaced the demand for parts of "regular servicers" (i.e., ISOs) with Kodak CESD's demand when it took over the ISOs' service business. Both demands were the same: they simply conformed to Kodak's long-standing "Replacement Parts Principles," to stock parts for the entire Kodak machine population

regardless of who serviced the machines. Kodak's effort to identify and ferret out ISOs, which Kodak admits resulted in less than 5% of the specially processed parts orders being denied, L 112, was necessarily more expensive than any alleged savings from lower parts inventories. The facts belie the excuses and should be tried.

3. ISOs are not Free Riders.

ISOs were not free riders "exploiting" Kodak in any meaningful legal or economic sense, let alone enterprises whose foreclosure was justified. Kodak's suggestion that ISOs are free riders on its capital investment in equipment is like Henry Ford complaining that companies selling gasoline and lubricants to owners of Ford cars are free riders on the Ford Motor Company. ISOs offered low cost, high quality service and invested in their own parts inventory. JA 467. If anything, they enhanced the demand for Kodak Equipment by ensuring that customers would be well served after they purchased new equipment. Free riders generally sell goods without service, or inferior service for a lower price by not providing some costly services others offer. *See* VIII P. AREEDA, ANTITRUST LAW ¶¶ 1161-62 (1989). There is no evidence of that here.[8]

[8] In its brief, Pet. Br. 7, Kodak seems to raise two addiional efficiency justifications for Kodak's monopolizing conduct: (1) some customers will prefer the manufacturer to be responsible for repair problems to avoid divided responsibility, and (2) Kodak learns more about satisfying customers when it provides follow-up service. These assertions provide no justification for Kodak's anticompetitive conduct. If customers believe that service from Kodak is valuable because it eliminates divided responsibility and the potential for "finger pointing," they will voluntarily purchase service from Kodak in a competitive market. If Kodak believes that direct service strengthens its relationships with existing captive customers, it can price its service contract competitively to attract more service customers.

H. Kodak has Market Power in at Least Three of the Significant Markets for Kodak Equipment.

Kodak claims it cannot, regardless of the facts, monopolize a service market for Kodak Equipment *if* it lacks market power in the basic equipment markets. Kodak says the record shows that its new equipment markets are competitive. Pet. Br. 2-3.[9] Kodak's admissions, buttressed by a Kodak merger since the summary judgment motion was filed, show Kodak market power in at least three significant new equipment markets. This belies the assertion of fierce competition in those markets.

1. Kodak is a Duopolist in the High Volume Copier Market.

In 1987, Kodak had a 28% share of the high volume copier market. JA 177, 198.[10] It identified IBM and Xerox as the only other significant competitors in this market, both Xerox and IBM having even larger shares. JA 198, 176-77, 192. Kodak seems to believe that this high a share in a three-firm market is consistent with fierce competition. However, barriers to entry were so formidable that between 1985 and 1987, using Kodak's own market share data, even Japanese copier manufacturers could not significantly penetrate the market. In April 1988, eight months after filing its motion for summary judgment,

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[9] Kodak's witnesses have identified at least seven product markets for Kodak Equipment: high, mid and low volume copiers in the copier industry, and capture, retrieval, CAR systems and COM recorders in the micrographics industry. *See* p. 3 above.

[10] Kodak variously defines this market as machine speeds of 60 copies per minute ("cpm") and 70 cpm, and variously sets its market share for 70 cpm machines at 25% and 27.6%. JA 177. The difference is not material.

Kodak acquired IBM's copier business. The high volume copier equipment market thereupon became a duopoly.[11] By 1988, Kodak had a near monopoly share of this important and lucrative basic equipment market.

At about the same time Kodak acquired IBM's copier business, the third firm in this market, Xerox, was changing its policy toward Xerox ISOs so that, by mid-1988, not one high volume copier manufacturer permitted competition in the sale of copier service.[12] Consequently, choice of service was effectively unavailable to any purchasers of high volume copiers.

2. Kodak has Significant Power in the Market for Capture Products and the Market for Computer Assisted Retrieval Systems.

Kodak concedes that, in 1986, it had a 42% share of the market for capture products. JA 159. If this is now disputed, the issue should be tried. Kodak concedes that computer assisted retrieval systems are a separate market in micrographics and that, in 1986, Kodak had a 51%

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[11] See pp. 5 and 25 of Kodak Annual Report to Stockholders for 1989, Appendix A. Copies of this Annual Report have been lodged with the Clerk by Respondents. This fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Thus, this Court may take judicial notice. Fed. R. Evid. 201(f). *See, e.g., Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979). This acquisition is raised here to show Kodak's heightened market power in basic equipment. It will be relevant on remand in seeking injunctive relief and post-merger damages.

[12] *Canada (Director of Investigation and Research) v. Xerox Canada Inc.*, 33 C.P.R. 83, 97, 99, 127 (3d 1990) (stating that Xerox United States restricted supply of parts to U.S. ISOs). Copies of this opinion have been lodged with the Clerk by Respondents.

share of this product market. JA 159. If now disputed, this issue should be tried.

I. Kodak Equipment Purchasers are Locked-In to Kodak Equipment.

Kodak Equipment buyers are locked-in. They cannot change equipment brands when confronted with a price increase for parts or service above the competitive level. The lock-in occurs because the cost of replacing the basic equipment exceeds the cost of paying monopoly prices for parts and service over the life of the machine. By 1987, a Kodak Ektaprint 150AF copier which costs $75,000 new, had an open market resale value of only $2,500-$3,500. JA 506, 427-28, 519-21, 358-59. Any Kodak customer with several relatively new copiers was therefore constrained, locked-in, from buying competing new equipment in response to higher service prices. One customer, CSC, for example, owns more than 100 pieces of Kodak micrographic equipment which would cost about $1.5 million to replace. JA 424-25. Costly micrographic software would have to be reprogrammed. JA 425. Personnel would have to be retrained. *Id.*

Kodak disputes the existence of a lock-in in the retrieval devices market. JA 707-08. However, Kodak fails to explain why it cannot price parts and service above competitive levels in the face of high replacement costs. JA 425-26, 537.

J. Parts and Service Markets for Kodak Equipment Have Distinct Characteristics.

In the mid-1980s, before Kodak implemented its boycott policy, demand for Kodak parts and service was

developing separate from the demand for basic copier and micrographics equipment. Thus, many large purchasers of Kodak Equipment chose the more responsive, more skilled, less expensive ISOs to service and provide parts for their Kodak Equipment. Some of these customers had different employees responsible for purchasing basic equipment than for purchasing parts and service. Often these purchase decisions were not in fact coordinated. JA 429-30. Without such a distinct consumer demand for service, ISOs could not have developed.

Kodak parts are not interchangeable with parts designed for competing copiers and micrographic products. There is nothing in the record to indicate that substitute parts, especially a full line of them, can be made cheaply in small quantities by potential suppliers not presently in the market. There is thus a barrier to entry into the market for the sale of Kodak parts to Service Customers. Kodak has further discouraged potential parts supply substitutability by referring OEMs vaguely to its unspecified "proprietary rights" in parts for Kodak Equipment. L 150. In fact, however, Kodak has no such rights. *See* p.6 n.4.

Service for other brands of copier and micrographic equipment is not reasonably interchangeable with Kodak service. Service for Kodak Equipment requires special knowledge and training that many service organizations do not possess. Equipment technicians must complete training programs to service Kodak copier and micrographic equipment. Many ISOs were started by former Kodak service employees who spent years learning the complexities of Kodak Equipment. JA 412-13.

K. Both in Fact and Logic, an Absence of Power in new Equipment Markets Does not Prevent Kodak From Exercising Monopoly Power in Kodak Aftermarkets.

Kodak is wrong to contend it cannot monopolize an aftermarket if the equipment market is competitive.[13]

Kodak's unanticipated change in its service policy in late 1985 allowed Kodak to raise the price of service to captive owners of Kodak Equipment. Kodak earned higher service revenues, harming both captive consumers and ISOs as a result of this opportunistic behavior against its locked-in customers. Since Kodak's new service policy was not widely disclosed, uninformed customers purchasing equipment after the new policy went into effect also would be locked-in. Therefore, the captive population is large.

Kodak claims that these anticompetitive effects are implausible based on its hypothesis that it lacks market power in the market for new equipment. Because of this lack of market power in new equipment, it is argued, Kodak cannot profitably raise the prices of parts and service because buyers view parts and service as parts of the total life cycle cost of Kodak Equipment. Pet. Br. 4.

Kodak's counterargument is incorrect for both theoretical and factual reasons. Even if, arguendo, after 1985, prospective new customers for basic equipment were apprised of Kodak's control of parts, service and used

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[13] This analysis and that in Section II of the Argument have been developed with the assistance of Professor Steven C. Salop, Professor of Economics and Law at Georgetown University Law School. Professor Salop is a recognized economic expert in the fields of industrial organization, competition, and antitrust. He is cited with approval by Kodak. Pet. Br. 37.

equipment, as well as the effect of Kodak parts and service pricing on life cycle costs, Kodak could still profitably charge monopoly prices for parts and service to existing captive Kodak Equipment owners who bought equipment prior to 1985. It could do this by avoiding any effect of such price increases on prospective new equipment purchasers,[14] and Kodak could continue to extract substantial monopoly rents from the pre-disclosure captives. The captives would have no choice but to pay the higher service charges.

Furthermore, even if Kodak lost some new equipment customers as a result of its policy to raise service costs monopolistically, it is a factual question whether enough prospective new customers would respond as Kodak predicts to deter such monopolistic pricing of parts and service. Even if Kodak had no market power in new equipment, it would lose only *some* new equipment sales from the policy change, not all of its customers. It is far from clear on this record whether Kodak would lose enough new sales to offset the increased service profits earned from captives. The kind of strong inference Kodak wishes to make requires data on the size of the

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[14] For example, Kodak could choose not to raise the price of parts and service to some new customers by offering them a lower priced service contract at the time of purchase. Alternatively, Kodak could reduce the price of basic equipment by the same amount as the monopoly surcharge for parts and service. In this way, the full, life cycle price of equipment plus parts and service would not rise for the new prospective customers who retained the ability to purchase alternative brands of equipment. At the same time that these customers were immunized from the price increases, Kodak could opportunistically raise service and parts prices to the existing, locked-in owners of Kodak Equipment. Kodak has regularly charged, through negotiations and the bidding process, different prices for equipment, parts and service for different customers. *See, e.g.*, JA 420-22, 536. In this way it could exploit the lock-in for captive customers without affecting the sales of new equipment.

installed base of existing captive equipment owners versus the number of new equipment prospects over time, the elasticity of demand for new Kodak Equipment, the fraction of profits accounted for by equipment and service, the costs of equipment, parts and service, and other factors not yet fully identified. Put simply: on the present record, there is an abundance of evidence that Kodak can extract monopoly prices from Service Customers without any substantial adverse effect on Kodak Equipment sales. JA 423-27, 420, 422, 474-75.

L. Proceedings Below.

The Complaint, filed April 14, 1987, alleged *inter alia* the violations addressed by this brief. JA 14-35.

Kodak's Answer broadly denied these allegations. JA 65-84. On September 11, 1987, Kodak moved for summary judgment before Judge William W. Schwarzer in the district court for the Northern District of California. Kodak's position was that the facts as stated by Respondents were essentially undisputed. JA 91-92 (Kodak policies, "with relatively minor corrections, are as the Complaint describes them. . . . [T]he purpose of this summary judgment motion is not to say 'No, we didn't do it.' ").

Over objection, the district court limited Respondents' discovery to 30 interrogatories (JA 255-98), 22 document requests (JA 315-25) and four one-day depositions. The court refused to permit further discovery beyond two more (one-day) depositions of Kodak witnesses to explore market power issues. Some information was developed, over Kodak resistance, showing Kodak's power in aftermarkets. *See*-JA 609-82 *passim*, especially 650. Nonetheless, the court denied Respondents' Rule

56(f) motion for further specified discovery. JA 243-47; Pet. App. 37B-38B.

On April 18, 1988, the district court granted Kodak's motion and dismissed the action. It rejected the Sherman Act Section 1 allegations of conspiracy as based on hearsay, even though Kodak had admitted there were no "seriously disputed" issues alleged in the Complaint.[15] The court also ignored Kodak documents in the record which support an inference that Kodak conspired with others to cut off ISOs. Kodak's conduct was viewed simply as a legal unilateral refusal to deal with ISOs.

Respondents appealed to the Ninth Circuit. While focusing primarily on the leveraging of monopoly power over parts to monopolize the Kodak service market, Respondents indicated they were not just arguing a per se theory of tie-in liability. They sought the chance to try the material issues of fact alleged in the Complaint. JA 746-47. Kodak conceded that the appeal preserved Respondents' allegations *if* there were any genuine issues of material fact between the parties, which it denied. JA 808-09.

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[15] Most of the evidence of concerted action is admissible as hearsay exceptions such as records of regularly conducted activity, co-conspirator declarations, and commercial publications, or as non-hearsay, such as admissions of a party opponent. *See, e.g.*, Fed. R. Evid. 801(d)(2), 803(6). In addition, the district court's refusal to grant Respondents' motion for further discovery, including third-party discovery, which could have cured any admissibility problems, make it inappropriate to ignore any of this evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 326 (1986) (summary judgment is inappropriate if non-moving party lacked adequate opportunity to obtain discovery). The evidence is more than sufficient to show the correctness of the court of appeals in reversing the summary judgment order. Evidentiary problems can most appropriately be addressed after discovery has been completed.

On May 1, 1990, the Ninth Circuit, in a two-to-one decision, reversed the order of dismissal, finding that triable issues of fact existed as to both Respondents' Sherman Act Section 1 and Section 2 claims. Writing for the majority, Judge Charles E. Wiggins concluded that requiring a person not to deal with another can be an illegal tie-in, Pet. App. 5A-6A, and that whether parts and service are separate markets is a disputed issue of fact. *Id.* at 6A. The court further concluded that whether it is possible for a firm in a competitive basic equipment market to charge supercompetitive prices for parts is not a question that should be decided on a "theoretical basis," but should be tested by facts. *Id.* at 10A. The court noted the "very limited discovery" allowed Respondents. *Id.* at 10A n.4. To require Respondents at this stage in the proceedings to conduct a market analysis and pinpoint "specific imperfections in the copier and micrographics markets . . . in order to withstand summary judgment," the majority held, "would elevate theory above reality." *Id.* at 10A. The majority further held that whether Kodak's business justifications were legitimate or pretextual is likewise a disputed issue of fact, as is whether Kodak's conduct was unilateral. *Id.* at 14A-15A. Judge J. Clifford Wallace dissented.

SUMMARY OF ARGUMENT

There is one core legal issue in this appeal. Does the record present sufficient evidence of triable issues of fact which, if resolved in Respondents' favor, would result in a determination of antitrust liability under the allegations in the Complaint? Despite the truncated discovery permitted below, Respondents have presented sufficient evidence.

Under Kodak's analysis, the most important factual question is whether Kodak has market power in certain markets for new equipment. Kodak's essential argument is that it cannot have committed the violations Respondents allege *if* it lacks market power in these "highly competitive" markets. A fortiori, if there is sufficient evidence to put in issue the presence or degree of market power and competitiveness in these basic equipment markets, Kodak's summary judgment motion must fail on its own terms. Such evidence is present here.

Kodak says that the key legal issue is whether it is economically plausible for a manufacturer lacking power over price in "competitive" new equipment markets to monopolize aftermarkets for its own brands, or to exploit market power in one of these aftermarkets by tying sales in the other. The answer is that even if Kodak did not have market power over basic equipment, it still would have a rational incentive to act opportunistically by raising prices of service against its large installed base of locked-in customers who either (1) purchased Kodak Equipment before Kodak's 1985 policy change, or (2) purchased equipment after 1985 not knowing of the change and expecting competition, not monopolization, in the service market for the equipment they were buying. In fact, Kodak's concession that distinct Kodak aftermarkets exist undermines its defense because the definition of a market necessarily implies the possibility of its being monopolized. Summary judgment is inappropriate if Kodak now chooses to dispute this material fact.

This Court would have to reject almost eighty years of its jurisprudence favoring unimpeded competition in aftermarkets to accept Kodak's arguments and prevent Respondents from proving monopolization and tying in aftermarkets for Kodak Equipment. It would be using a

case with limited facts as the basis for accepting a controversial economic theory. Nevertheless, even if it were decided that equipment manufacturers without power in basic equipment markets have a per se right to monopolize and tie parts and service aftermarkets for their products, the issue of equipment market power remains and is triable.

Another triable issue is whether Kodak engaged in a conspiracy with independent OEMs and non-ISO Kodak parts and service customers to boycott ISOs and thereby unreasonably restrain competition. If the record contains sufficient evidence to raise this as a triable issue, as the court of appeals found, dismissal of this action is similarly improper.

ARGUMENT

I. The Record Contains Genuine Issues of Material Fact Which Preclude Summary Judgment.

A motion for summary judgment must fail if the record contains a genuine issue of material fact "that might affect the outcome of the suit under governing law," and as to which a jury might reasonably find for the respondent. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In this Court, evidence on summary judgment is reviewed de novo; the Court does not merely rely on the understanding of the record of the lower courts. *Board of Education v. Pico*, 457 U.S. 853, 872-73 (1982); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The evidence must be construed in the light most favorable to the Respondents, and all reasonable inferences must be drawn in their favor. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

Respondents have raised as a material issue of fact, with supporting evidence in the record, that separate markets exist for parts and service for Kodak Equipment. To seek summary judgment, Kodak must concede, as it has, that market definition is not in issue.[16] Otherwise, it cannot be entitled to summary judgment. However, if parts and service aftermarkets exist, they are, by definition, capable of being monopolized.[17] Accordingly, Kodak must concede that there is a material issue of fact as to whether separate markets for parts and service exist or it must dispute the material issue of monopoly power in the parts and service markets. Either way, Kodak should not be granted summary judgment.

In *Matsushita*, this Court held that when an antitrust plaintiff's claim "makes no economic sense, respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587. That rule has no bearing on this case. The plaintiffs in *Matsushita* presented an implausible theory of predatory pricing including, *inter alia*, a claim that defendants priced their televisions below cost for more than two decades. *Id.* at 592.[18] In this case, in contrast, Respondents have shown that it makes economic sense

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[16] *See* JA 688; Pet. Br. 16; Solicitor General's Brief in Support of Certiorari ("SGB Cert.") 6 n.5; Solicitor General's Brief ("SGB") 12 n.10. Kodak then inconsistently asserts that these markets cannot be restrained or monopolized. Pet. Br. 15-16, 33.

[17] *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, MERGER GUIDELINES § 2.1 (1984) ("[T]he Department will include in the product market a group of products such that a [monopolist] could profitably impose a 'small but significant and nontransitory increase in price.' ").

[18] The defendants in *Matsushita* moved for summary judgment only "[a]fter several years of detailed discovery." *Id.* at 578. The "essence" of the evidence considered by the lower courts and filed with the Court consumed 40 volumes. *Id.* at 577.

for Kodak (1) to conspire with OEMs and Service Customers to boycott ISOs, (2) to monopolize the parts market, (3) to leverage its parts monopoly to monopolize the service market, and (4) to illegally tie parts to service. They have also come forward with specific evidence that "tends to exclude" the possibility that Kodak's conduct was consistent with permissible competition.

There are almost two dozen issues of disputed material fact identified in this brief. Even so, a full record can only be developed following remand for discovery which, to date, Respondents have largely been denied.

II. There is Substantial Evidence of Kodak's Monopoly Power in the Markets for Kodak Parts and Kodak Service and of Kodak's Market Power in at Least Three Basic Equipment Markets.

A. A Fact Finder Could Reasonably Find That the Markets for Equipment, Parts and Service are Separate and Distinct.

1. Market definition is a question of fact dependent upon the special characteristics of the industry involved. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 111 (1984). A market is the smallest group of products as to which a monopolist could profitably raise prices over competitive levels. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); MERGER GUIDELINES § 2.11.

Cross-elasticity of demand is the principal criterion for defining markets. If the cross-elasticity of demand is high, then a firm cannot effectively raise the price of its products because a substantial percentage of its customers will switch to a substitute soon after the price increase takes effect. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Cross-elasticities of demand here

are low. Kodak could benefit from an increase in the price of Kodak parts or service over competitive levels notwithstanding some potential loss of new equipment sales. Kodak is able to increase the cost of parts and service for its equipment above a competitive level, without causing a significant number of its customers to substitute competitor's equipment for more expensive parts and service. Moreover, lack of readily available information concerning the cost and availability of parts and service strengthens the divisions between the new equipment markets and these two aftermarkets. *See* pp. 10-11, 19 above.[19]

2. The parts market at issue in this case consists of parts that fit Kodak copiers and micrographic equipment, *not* the Kodak brand parts market as now claimed by Kodak. Pet. Br. 12. The market is "limited" to Kodak simply because parts from other brands of basic equipment cannot be used in Kodak Equipment. This Court has itself defined relevant markets to include only one or two brands of products. *See, e.g., Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (the professional photographic parts and supplies market was made up entirely of Kodak parts and supplies); *IBM Corp. v. United States*, 298 U.S. 131, 132, 136 (1936) (relevant market for punch cards, of which IBM produced 81%, included all punch cards that could be used in IBM tabulation machines, though IBM had several competitors in the market for tabulation machines).

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[19] Supply or production substitution provides no effective constraint on Kodak's power in the parts and service markets. *See* MERGER GUIDELINES § 2.21. To compete effectively in the sale of parts to Service Customers, access to a full line of Kodak parts is required. The breadth of the line of Kodak parts, coupled with Kodak's restrictive agreements with OEMs, make it infeasible for anyone to compete against Kodak in the parts market. Similarly, supply substitution in the service market was impossible because of Kodak's denial of access to the necessary parts.

Kodak cites the famous dictum in *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 393 (1956), to the effect that the power every manufacturer has over its own nonstandardized product does not make that product a market. Pet. Br. 33. Nothing in *duPont* or elsewhere, however, says that a single brand *cannot* constitute a relevant product market if that brand has no acceptable substitutes. In fact:

> [d]etermination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.

351 U.S. at 393. In *duPont*, cellophane did not constitute its own market because other products were "alternatives that buyers may readily use for their purposes." It was not because cellophane was a single brand. *Id.* at 394.

3. Below, Kodak stated it did not challenge the existence of a service market for Kodak Equipment for the purposes of its summary judgment motion. JA 688.[20] Kodak now claims, however, that the Kodak service market cannot be separated from the Kodak parts market because replacement parts are only an input into service and therefore not functionally independent. Pet. Br. 14-15 n.3. Functional independence is not the test of a market. This Court has held that whether two separate markets exist depends "not on the functional relation between them, but rather on the character of the demand for the two items." *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 19 (1984).

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[20] Kodak does not dispute the existence of a service aftermarket in its brief, but it now purports to dispute the market's boundaries. Pet. Br. 33. *See also* SGB 12 n.10. As indicated above (p. 26-28), that, in itself, is sufficient grounds to deny summary judgment on Kodak's core question.

Functionally linked products have been found to be distinct markets. An interrelationship between two products does not necessarily suggest a tie, but it may make a tie especially easy to arrange and attractive due to the seller's increased ability to maximize profits by, in effect, charging a higher price to buyers of the tying product. *Id.* at 19 n.30. This Court has held, for example, that anesthesiologist services are distinct from hospital care despite a functional relationship, *id.*, and that salt is distinct from a salt machine despite a functional relationship, *International Salt Co. v. United States*, 332 U.S. 392, 394-96 (1947). Amici have shown the separation between equipment, parts and service for automobiles. *See Mozart Co. v. Mercedes Benz of North America, Inc.*, 833 F.2d 1342 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); *Metrix Warehouse, Inc. v. Daimler-Benz AG*, 828 F.2d 1033 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988).

There is substantial record evidence showing that customers' demand for the provision of service was separate from the demand for the provision of equipment and parts, and that prior to 1986, service was sold separately by ISOs in competition with Kodak. *See* pp. 2, 11-12, 18-19 above. Customers view new Kodak Equipment as separate from parts and service, and they view parts and service as separate from each other. Some Kodak Equipment owners purchased parts from Kodak and then serviced their machines themselves or hired ISOs to perform the service. *See* p. 3 above. In fact, the Kodak service market is an "interbrand market" that includes several different "brands" of service. The ITS brand of service was obviously different from the Kodak brand, as Kodak concedes. Pet. Br. 18.

If Kodak now wishes to contest Respondents' market definitions, it should do so after full discovery, as did

almost every defendant in the cases Kodak relies on for the proposition that the Kodak service market is not distinct.[21]

4. Irrespective of the degree of Kodak power in basic equipment markets, there is little doubt that if, as Respondents maintain, parts and service for Kodak Equipment are distinct relevant markets, Kodak has monopoly power in each. *See* pp. 28-34.

B. There is Substantial Evidence of Kodak Market Power in at Least Three Basic Equipment Markets.

Kodak says it faces "fierce competition" in the basic equipment markets for its products. Pet. Br. 3. That is hard to believe when one of these markets is a duopoly (high volume copiers), when Kodak acknowledges a 51% market share of another (computer assisted retrieval systems), and when in a third (micrographic capture equipment), Kodak admits a 42% market share. These large shares are prima facie evidence that Kodak has market power in these markets and that the markets are not fiercely competitive, but oligopolistic. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364-65 (1963) (presumption of market power based on 30% share); MERGER GUIDELINES § 3.12 (presumption of market power based on 35% share). The record therefore fully supports the Ninth Circuit majority in its conclusion that the level of competition in the basic equipment markets does

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[21] *See duPont*, 351 U.S. 277 (1956); *Mozart*, 833 F.2d 1342 (1987); *Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622 (1st Cir. 1984) (court of appeals vacated district court's preliminary injunction); *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566 (6th Cir. 1981) (J.N.O.V. granted after full trial); *Spectrofuge Corp. v. Beckman Instr., Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

not preclude, as a matter of law, monopolization and tying in the parts and service aftermarkets for Kodak products, and is an issue that should be tried. Pet. App. 12A, 15A, 19A.

C. Even as to new Equipment Over Which Kodak Does not Have Market Power, it Makes Economic Sense for Kodak to Act Opportunistically by Recovering Monopoly Profits From Captive Customers in Servicing its own Brands.

Record evidence shows that Kodak changed its service policy in 1985 to prevent ISOs from providing service to the installed base of Kodak Equipment owners. The Solicitor General (SGB 16 n.13) and Kodak claim it is implausible for Kodak to have sufficient market power to exploit Service Customers if the basic equipment markets are competitive. Although Kodak could raise parts and service prices it charges current locked-in equipment owners, Kodak claims that it would lose so many new equipment sales as a result that the price rise would not be profitable overall. Pet. Br. 24-26. This claim is disputed and is inherently a factual matter. *See* pp. 20-22 above. There is no reason to think that Kodak's loss of new equipment sales would be greater than gains from monopolistic profits extracted from captive customers through parts and service monopolization. Some customers were locked-in to Kodak Equipment for replacement sales because the cost of switching equipment brands exceeded the monopoly rents for parts and services that the customer would pay to Kodak. *See* p. 18 above. There is nothing in the record to show that Kodak informed prospective new customers that it would not

sell parts to ISOs or that it would require Service Customers to boycott ISOs. Uninformed customers of new equipment also would not be likely to switch brands in response to the higher prices of parts and service. Kodak could also insulate new equipment purchasers from monopolist parts and service prices. *See* p. 21 above.[22]

The overall profitability of the change in policy depends on the size of Kodak's installed base relative to annual sales, demand elasticity for Kodak Equipment, prices, costs and other variables referred to above. Even if, arguendo, Kodak had no market power in new equipment, it would not follow that Kodak's loss in new equipment revenues would outweigh its gain in parts and service revenues. Lack of market power in new equipment would only mean that a price increase would reduce demand for new equipment to some degree. It would *not* mean that demand for new equipment would disappear entirely, or that demand would necessarily fall by enough to offset the gain in profits earned on parts and service supplied to the locked-in equipment

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[22] The Solicitor General states that the Court's analysis in *Hyde* was unaffected by customers who were locked-in to the hospital's services because they were already checked into the hospital. SGB 9. This comparison does not support Kodak's position as a factual matter. At the time the hospital changed its policy, only a very small number of patients were locked-in as a result of already having entered the hospital, relative to the potential annual loss in patients from the policy change. In contrast, at the time of Kodak's change in policy, a far higher installed base of customers were locked-in to Kodak for service because they had already purchased Kodak Equipment with a useful life of several years. This number is even larger since Kodak's opportunistically-changed policy was generally undisclosed to the public, at least until this lawsuit was publicized. There is evidence that each Respondent had numerous customers who were forced against their wishes to use Kodak rather than ISOs for service. There is no basis for the Solicitor General's speculation that there are only a "handful of objecting customers" in this case. SGB 22-23.

owners.[23] Thus, even if Kodak did not have market power in new equipment, it was still likely to possess market power in parts and service. Kodak's contrary claim cannot be validated without additional discovery.[24]

Similarly, lack of equipment market power does not mean that there will be no long run effects on consumers, as suggested in Judge Wallace's dissent. Pet. App. 23A. To the contrary, even if some future equipment sales were lost, locked-in customers would pay more for service over the life of their equipment. And, even if Judge Wallace's economics were right, and all monopolies are eliminated in the "long run," short run monopolization nevertheless harms consumers and is prohibited by antitrust laws.

III. Kodak's Conduct Constituted Monopolization, Attempted Monopolization, and Tying in Violation of Sections 1 and 2 of the Sherman Act.

Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. It is violated when the defendant (1) possesses monopoly power in the relevant market, and (2) has willfully acquired or maintained that power. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595-96 & n.19 (1985); *Grinnell*, 384 U.S. at 570-71. Tying is prohibited by Section 1 of the Sherman Act. The "essential characteristic" of the tying offense is

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[23] This is the logic of the circuit court's statement that "[s]ome strength in the interbrand market, although short of actual market power, can combine with other factors to yield power in an after-market." Pet. App. 12A.

[24] There is also a factual issue as to whether Kodak can effectively price discriminate, giving informed customers better terms than the uninformed. Kodak's hypothesis that uninformed customers will automatically benefit from lower prices for parts and service to the sophisticated, Pet. Br. 23, is unsupported by this record. *See* pp. 20-22 above.

"the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer . . . might have preferred to purchase elsewhere on different terms." *Hyde*, 466 U.S. at 12.

The record establishes that Kodak monopolized the market for parts for Kodak Equipment and then used that monopoly to obtain monopoly power over the market for service of Kodak Equipment, preventing buyers from obtaining service elsewhere on different terms. This conduct constitutes both unlawful monopolization and unlawful tying.

A. Monopolization.

1. Monopoly Power. Kodak has monopoly power in the nationwide market for the sale of *parts* for Kodak Equipment to Service Customers. Monopoly power is "the power to control prices or exclude competition." *duPont* 351 U.S. at 391. Market share is indicative of monopoly power. *Grinnell*, 384 U.S. at 571. Kodak's market share for the sale of replacement parts for Kodak Equipment to Service Customers approaches 100%. JA 120. Kodak has demonstrated its ability to raise prices and to eliminate competitive sources of parts. *See* pp. 5-12 above.

Under the standards set forth in *duPont* and *Grinnell*, Kodak also has monopoly power in the *service* market. Kodak has forced ISOs out of the market, leaving Kodak as the only source of service for the vast majority of Service Customers who do not self-service their machines. Kodak has demonstrated its power to raise prices and to eliminate ISOs from the market. *See* pp. 9-12 above.

2. Willful Acquisition or Maintenance. Monopolization requires proof only of a *general* "purpose or intent to exercise" monopoly power. *Aspen*, 472 U.S. at 602-03; *United States v. Griffith*, 334 U.S. 100, 105 (1948). Respondents need only show some element of deliberateness, for

"no monopolist monopolizes unconscious of what he is doing." *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945) (L. Hand, J.). *See Aspen*, 472 U.S. at 602-603 ("As Judge Bork stated more recently: 'Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended.' ")

Both Kodak's parts monopoly and its service monopoly were acquired and maintained deliberately. As to parts, Kodak instructed OEMs not to sell parts to ISOs, coerced Service Customers not to sell parts to ISOs, and closed the used machine market as a source of parts. As to service, the record is clear – in fact, there appears to be no dispute (*see* Pet. Br. 6) – that Kodak's specific purpose was to capture for itself the entire market for servicing Kodak Equipment.

When the objective is to create a monopoly, otherwise legal unilateral refusals to deal become unlawful. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). *See Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951) (publisher's attempt to maintain its monopoly by forcing advertisers to boycott a competing radio station violated Section 2); *see also Griffith*, 334 U.S. at 107 (use of monopoly power in one market, even if lawfully acquired, to foreclose competition in another market, violates Section 2); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 340 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (Sherman Act Section 2 was violated because, *inter alia*, United Shoe lease-only policy "has had the effect that there are no independent service organizations to repair complicated machines"). Following *Colgate*, *Lorain Journal*, *Griffith* and *United Shoe*, Kodak's acquisition of monopoly power in the service market by, among other things, forcing Service Customers to boycott competing ISOs, violated Section 2 – whether "unilateral" or not.[25]

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[25] *But see* pp. 5-9 above (the conduct here was concerted, not unilateral).

A monopolist also violates Section 2 when it discontinues long-standing and efficient distribution policies in "a deliberate effort to discourage its customers from doing business with its smaller rival." *Aspen*, 472 U.S. at 610. Such a change alters the character of the market:

> In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns, one rival can impose costs upon another, that is force the other to accept higher costs.

Id. at 604 n.31 (quoting R. BORK, THE ANTITRUST PARADOX 156 (1978)). The record firmly supports the inference that Kodak violated Section 2 by discontinuing long-standing cooperative arrangements with ISOs in order to monopolize the service market.

B. There is Unlawful Tying Under Either a Per Se or Rule of Reason Approach.

1. Per Se Tying. The critical anticompetitive feature of tying arrangements is the "suppression of competition" in the tied product market. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958). Tying arrangements could unjustifiably ensure the success of a qualitatively inferior (or unfairly priced) tied product, harm existing competitors, create barriers to entry into the market for the tied product, and deprive consumers of the freedom to choose the best-priced, highest quality product in the tied product market. *Hyde*, 466 U.S. at 14-15; *Northern Pacific*, 356 U.S. at 6-8. This Court's opinions have consistently condemned as per se unlawful – unlawful without

further examination of purpose or effect – tie-in conduct where "the existence of forcing is probable." *Hyde*, 466 U.S. at 15, 16; *Northern Pacific*, 356 U.S. at 5-6; *International Salt*, 332 U.S. 392.

Kodak's defense to the per se tying charge is (a) that its conduct constituted mere unilateral refusals to deal, and (b) that its purported lack of power over basic equipment markets deprived it of sufficient economic power required to support a per se claim. Pet. Br. 15-17. *Cf. Hyde*, 466 U.S. at 12-14. Both arguments were properly rejected by the court of appeals.[26]

a. As discussed at p. 8 above, Kodak sold parts to ISOs only on the condition that the ISOs not provide service on any Kodak Equipment other than their own. Kodak also sold parts to equipment users who serviced their own machines only on the condition that these purchasers not obtain service from ISOs. These conditioned sales are not unilateral refusals to deal; they are classic tying arrangements. This Court held in *Northern Pacific*, 356 U.S. at 5-6, that "an agreement by a party to sell one product but only on the condition that the buyer . . . will not purchase that [tied] product from any other supplier" may constitute an unlawful tying arrangement. *Northern Pacific* requires rejection of Kodak's argument here; *see also United Shoe Machinery Co. v. United States*, 258 U.S. 451, 457 (1922).

b. Kodak asks this Court to infer that it lacked sufficient market power to support a tie from the existence of some competition in equipment markets. Whether there was competition in equipment markets is

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[26] Kodak also argues that parts and service form one product, rather than the two required to establish a tie. Pet. Br. 15. For the reasons stated at pp. 18-19, 28-32 above, the court of appeals properly rejected this argument.

beside the point. Even assuming that competitiveness in equipment markets is relevant for purposes of Respondents' tying claim, the real issue is *whether Kodak had sufficient market power in the tying market (parts) to force purchasers to take the tied product (service) from Kodak.* As the court of appeals recognized, Kodak tied service to parts, not service to equipment. Pet. App. 5A. It also recognized that Kodak did not even "dispute [Respondents'] claim that [some] equipment owners would have contracted with ISOs for service if they could have obtained parts separately." Pet. App. 6A-7A. The evidence in the record, discussed in detail at pp. 11-13, 18 above, is at least sufficient to create an issue of fact as to whether Kodak's power over parts forced undesired purchases of Kodak service.[27]

2. Rule of Reason. Even if this Court were to rule that Respondents cannot prevail under a per se analysis of their tying claims, the case should still be remanded for further development of facts relating to the effects of Kodak's conduct on competition in the service market – whether Kodak's conduct had an adverse effect on the price, quality, and choice of service available to Kodak Equipment owners. *Hyde*, 466 U.S. at 29-32; *id.* at 37-41 (O'Connor, J., concurring); *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 504 (1969).[28]

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[27] As Justice Stevens stated in *Hyde*, "*per se* condemnation. . . is . . . appropriate if the existence of forcing is probable," and again, "*per se* prohibition is appropriate if anticompetitive forcing is likely." 466 U.S. at 15, 16. Thus, once a showing of actual forcing has been made, it is no longer necessary to show the mere likelihood of forcing as a result of "market power." *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986) (market power is a surrogate for proof of adverse effects on competition).

[28] The court of appeals erroneously determined that Respondents had failed to raise a rule of reason argument in response to Petitioner's

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The three "threshold criteria" for subjecting a tying arrangement to a rule of reason analysis are: (1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct. *Hyde*, 466 U.S. at 37-41 (O'Connor, J., concurring). Kodak's tying arrangement easily passes these criteria – it has market power in parts, and there is substantial evidence that it has market power in certain equipment markets as well (*see* pp. 32-33 above); it already has acquired market power in the tied product (service) by driving the ISOs out of business (*see* pp. 11-12 above); and there is a strong basis, rooted in the historically separate demands for equipment, parts and service, to treat the tying and tied products as distinct (*see* pp. 28-32 above).

Once the "threshold criteria" have been met, the trier of fact must evaluate "the demonstrated economic effects" of the arrangement in question. *Id.* at 41 (O'Connor, J., concurring). These include the effects of the arrangement on price, quality, and consumer choice. In this case, there is substantial evidence that since Kodak

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motion for summary judgment. Pet. App. 4A n.1. Quite to the contrary, Respondents specifically stated in opposition to Kodak's summary judgment motion that "[i]llegal tying arrangements may receive a rule of reason analysis under Section 1" (JA 390). Although Respondents focused on the argument that Kodak had engaged in per se illegal conduct, they also argued that the tying arrangements instigated by Kodak had an adverse effect on price competition, quality competition, and consumer choice, and discussed the evidence in the record that supported those contentions. *See, e.g.*, JA 339-42, 369-71, 388-90. Moreover, Respondents acknowledged that if one viewed the per se test as creating a presumption of illegality, "the defendant may still escape liability by proving overall competitive reasonableness." JA 391.

implemented its restrictive practices, the price of service has increased, the quality of service has declined, and many ISOs have left the service business, thereby increasing market concentration and limiting consumer choice. *See* pp. 11-14 above. Whether this anticompetitive impact of Kodak's conduct is outweighed by any purported "contribution to efficiency," *Hyde*, 466 U.S. at 42 (O'Conner, J., concurring), should be determined at trial.

C. This Court Should not Abandon the Longstanding Antitrust Policy Prohibiting the Extension of Monopoly Power Through Leverage.

At bottom, the arguments of Kodak and its supporting amici are based on the proposition that the antitrust laws should not prohibit the extension of monopoly power into adjacent markets. At one point, in fact, Kodak openly suggests that this Court's many precedents holding that tying arrangements are illegal per se should all be overruled. Pet. Br. 16 n.6. For the most part, however, the requests to overturn the longstanding policy prohibiting the extension of monopoly power through leverage are disguised, grounded in quasi-economic speculation. Respondents urge the Court not to cast aside almost 80 years of national policy and precedent on so flimsy a foundation.[29]

Prior to 1914, there was no antitrust policy prohibiting the extension of monopoly power from one market to another. In the patent context, in fact, extension of

[29] The economic theory that extension of monopoly power to adjacent markets "cannot" be harmful to consumers has been discredited by more recent learning. *See, e.g.*, Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515 (1985); Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

power from one market to another was expressly upheld – largely on the basis of the very arguments advanced by Kodak and its supporting amici here. *See Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912). In 1914, however, Congress passed the Clayton Act, Section 3 (15 U.S.C. § 14) which recognized the potential anticompetitive effects of tying and of the extension of monopoly through leverage. Three years later, *Henry v. Dick* was expressly overruled in *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502, 518 (1917).

The policy against extension of monopoly power through leverage was affirmed in 1936 in *IBM*, 298 U.S. at 137-38, 140. In 1947, *International Salt*, 332 U.S. at 396, announced the rule that tying arrangements imposed by firms with market power were illegal per se. Between 1947 and 1983, the per se rule against tie-ins was reaffirmed many times. *See Hyde*, 466 U.S. at 10 n.14 (collecting cases). In 1984, in the face of a frontal assault on the rule, this Court decided in *Hyde* that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *'per se.'* " *Id.* at 9.

Economic theory – even if valid – is not a substitute for law. *See* Spivack, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, 52 ANTITRUST L.J. 651, 651-54, 672-74 (1983). Section 3 of the Clayton Act reflects a congressional determination that tying arrangements can be and sometimes are anticompetitive in the legal sense – irrespective of what certain economists may believe. The Clayton Act,[30] and this Court's

[30] Standards for tying are largely the same under Section 3 of the Clayton Act and Section 1 of the Sherman Act. *Hyde*, 466 U.S. at 23 n.39.

precedents under the Sherman Act, establish a national policy favoring "competition on the merits" in adjacent markets. *Hyde*, 466 U.S. at 9-15. To displace that long-standing policy in favor of an economic theory that is at best controversial would improperly usurp the authority of Congress to say what the antitrust laws mean. *See Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 170 (1983) (Powell, J.) ("it certainly is 'not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation.' "); *see also Payne v. Tennessee*, No. 90-5721, Slip op. at 18, 111 S. Ct. 2597, 2610 (1991) (Rehnquist, C.J.) ("[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved").

IV. There is Substantial Record Evidence That Kodak Conspired With OEMs and Service Customers to Effect a Boycott of Parts Sales to ISOs and of ISO Service to Service Customers in Violation of Section 1 of the Sherman Act.

Section 1 of the Sherman Act makes illegal conspiracies between two or more independent persons which unreasonably restrain competition. Conspiracies can occur where non-price restrictions are imposed between firms in vertical relationships. Some forms of such concerted action are legal, but these must generally be tested by a fact-based rule of reason analysis. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

The record indicates that Kodak has acted in concert with OEMs and non-ISO parts and Service Customers to enforce a concerted refusal to deal with ISOs. The legality of these upstream and downstream restrictions depends

on their reasonableness in light of the possible anticompetitive and procompetitive effects of the boycott. *Id.* at 50-52, 58-59. But it is implausible and without record support that these boycotts of ISOs had the requisite redeeming procompetitive purposes or effects. In any event, Kodak does not challenge the legal theory of Respondents' conspiracy claim, and the record provides specific examples of concerted action.[31]

Kodak conspired with OEMs and with Service Customers to refuse to sell parts to ISOs, and with Service Customers to refuse to buy service from ISOs. Kodak says that ISOs could avoid its parts restrictions by purchasing parts directly from OEMs. Pet. Br. 37-38. The record, however, indicates that Kodak caused OEMs to refuse to sell parts to ISOs. Kodak has produced no evidence of exclusive patent rights over OEM-made parts for Kodak equipment (even though such information was sought by interrogatory). *See* p. 6 n.4. Accordingly, the only plausible explanation on this record for the OEMs' refusal to deal with ISOs is that they agreed, or were compelled to agree, to Kodak's ISO boycott.

Kodak required Service Customers to agree in writing "that the parts that you purchase from Kodak Parts Service will be used only to service the unit identified," i.e., that the Service Customer would not sell the part to an ISO. L 178. Kodak also threatened to refuse to supply parts to Service Customers who resold them to ISOs. JA 428-29. Some non-ISO Service Customers had been making money by selling parts bought from Kodak to

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[31] Like Kodak, the Solicitor General ignores the Ninth Circuit's decision on Respondents' Section 1 conspiracy claim. *See* Pet. App. 15A.

ISOs at a substantial markup. The most reasonable explanation on this record for their sudden refusal to deal with ISOs is that they were complying with Kodak's boycott.

Kodak entered into sales agreements for parts with equipment owners that required owners to boycott the use of ISO service. Pet. App. 15A; JA 442, 439. Kodak required some equipment owners to boycott ISOs if they wished to buy parts from Kodak. *See* p. 8 above. Prior to Kodak's new restrictive policy in 1985, many Service Customers chose ISOs to service their machines. *See* pp. 2-3 above. Kodak's new policy illegally forced Service Customers to change this practice.

The boycott agreements unreasonably restrained competition in the market for service of Kodak Equipment. As ISOs were driven out, the market became more concentrated, customer choice declined, and prices increased. *See* pp. 9-12 above. Kodak cannot dispute that these effects were anticompetitive. *See, e.g., NCAA*, 468 U.S. at 98-100, 106-08; *Aspen*, 472 U.S. at 603, 605-08. Whether these anticompetitive effects were justified by any procompetitive efficiencies is a contested issue of material fact.[32]

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[32] In one Kodak document, a Kodak official reports attending a meeting in June 1985 with a representative of Xerox, its only significant competitor by 1988 in the high volume copier market, and many others, to discuss third party maintenance. L 130-32. Upon remand, Respondents would want to explore the connection between this meeting and the subsequent adoption by both Kodak and Xerox of a policy to prohibit the sale of parts to ISOs. *Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (group boycotts by competitors having market power are illegal per se). In *Sylvania*, this Court also left open the possibility that certain vertical restrictions "might justify *per se* prohibition." 433 U.S. at 58.

V. There is Substantial Record Evidence That Kodak's Efficiency Justifications for its Conduct are Pretexts for Intentionally Anticompetitive Activity.

Kodak presents three theories to justify its monopolistic practices: (1) ISOs undermined Kodak's image of quality service; (2) not selling to ISOs lowered inventory costs; and (3) ISOs were "free riding" on Kodak's capital investment. In fact, these "justifications" are mere pretexts for anticompetitive conduct, without evidentiary support in the record. *See* pp. 12-15 above. At most, the validity of these justifications presents triable issues of fact.

Contrary to the suggestion of the Solicitor General, SGB 14-15, it generally is not economically efficient for sellers to charge prices for complementary products that bear no relationship to costs. Efficiency is achieved when the price of each component reflects its marginal cost. *See generally* F. Scherer & D. Ross, Industrial Market Structure & Economic Performance 521 (3d ed. 1990) (preferred outcome is "competitive behavior at *all* stages"). Parts and service are not natural monopolies.

In contrast, if one component is priced above marginal cost and the other is priced below marginal cost, consumers will overconsume the low-priced component and underconsume the other. For example, if Kodak raises the price of service and lowers the price of equipment, at some point (an issue of fact) consumers will tend to buy new equipment when it would be more efficient to extend the used machine's life with additional service.[33]

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[33] The Solicitor General's example of bidding behavior of stenographic reporters for the FERC is not an example of efficiency enhancing conduct. SGB 15. Instead, it is a classic case of "rent seeking" by the bidders. In effect, FERC was awarding an absolute monopoly on the later sale of transcripts from FERC proceedings. The bidders clearly took into

(Continued on following page)

Economic theory (as well as the record) suggests that Kodak's exclusionary conduct is anticompetitive and inefficient. Kodak disagrees, so far without evidence. These are genuine issues of material fact properly resolved at trial. Injustice is likely to result if Respondents are not given a chance to test these claims during a discovery process so far largely denied them. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

VI. The Global Competitiveness of U.S. High Technology Manufacturers Will not be Promoted by the Rule Kodak Seeks.

Kodak (JA 104; Pet. Br. 41) and the Solicitor General (SGB Cert. 15-17) suggest that allowing this case to go forward will undermine the international competitiveness of Kodak and other U.S. high technology equipment manufacturers by raising litigation costs and promoting other unspecified inefficiencies. This is doubtful – unless the theory of antitrust enforcement itself is to be questioned, or one believes that the only way U.S. firms can compete in global markets is by receiving mercantilist protection at home. Because the antitrust laws and antitrust enforcers in the principal foreign markets in which U.S. manufacturers compete prohibit the conduct at issue in this case, even if Kodak gets protection in U.S. markets from a favorable ruling by the Court, it will still have to compete with ISOs in these foreign aftermarkets on non-exclusionary terms set by foreign competition laws.

(Continued from previous page)

account future anticipated monopoly revenues in formulating their bids. But the result of high bids reflected the value of the monopoly, not economic efficiency. It is surprising that antitrust enforcers would point with pride to government-sanctioned monopoly conduct and mistake it for efficiency.

The antitrust laws of the European Community, Canada and Japan, the three most important foreign markets for most U.S. manufacturing exporters, ECONOMIC REPORT OF THE PRESIDENT 405 (Feb. 1991), would all lead to a ruling in this case in favor of Respondents.[34]

The experience and judgment reflected in this foreign case law should be given credence by this Court. Put simply, other sophisticated competition authorities and their courts would consider Kodak's conduct inefficient and anticompetitive.

The position embraced in this case by Kodak, by a disturbing number of basic equipment manufacturers and, surprisingly, by the Justice Department, is that big companies should be presumed to be acting procompetitively when they seek and gain control over markets to service their equipment. Any contrary rule, we are told, including one which says such claims should be tested by factual support where material evidence to the contrary exists, is inefficient.

On the contrary, economic efficiency will not be served by giving Kodak and other high technology basic equipment manufacturers judicially sanctioned control over the service of their products. Efficiency is generally best served when prices equal marginal cost for each level of a complementary product stream. It is particularly ironic that the Justice Department is suggesting that U.S. companies need to control domestic aftermarkets to compete globally. The Justice Department has criticized Japan's use of the same type of practices the Solicitor General asks this Court to endorse.[35]

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[34] Brief amicus curiae of Computer Service Network International.

[35] *See generally* Justice Department Briefing, Federal News Service 4-8 (July 2, 1990) (criticizing vertical and horizontal boycotts in Japan, claiming that they restrict U.S. market entry); *see also "Survey Finds Auto Parts Prices in Japan Dramatically Higher Than Those in the U.S.,"* 8

(Continued on following page)

Long run efficiency and competitiveness are also better served by economic and judicial policies which encourage rather than retard service differentiation and specialization. This is especially true where, as here, it was the market mechanism, demand by Kodak Service Customers, which created a service market for Kodak Equipment. If, as this record and common sense suggest, prices are lowered and quality of services is enhanced by establishment of a specialized service industry, long run competitiveness is most likely to be served by judicial policies that allow these specialists to compete. A contrary conclusion pits manufacturer welfare against consumer welfare. The primary goal of U.S. antitrust law is to promote consumer welfare. That is the result Respondents seek here.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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INT'L TRADE REP. (BNA) No. 27 at 1013 (July 3, 1991) (Referencing DOC/MITI Automotive Price Survey which shows non-competitive auto parts market in Japan with market access barriers on foreign manufacturers).

APPENDIX A

Kodak acknowledged its 1988 acquisition of IBM's copier business in its 1989 Annual Report.[1]

> Contributing to [the growth of copy product sales] was the 1988 acquisition of IBM's copier service business which significantly broadened the division's base.

Eastman Kodak Company 1989 Annual Report, p. 25.

The fact that Kodak sold IBM copiers is confirmed by Kodak's identification of IBM copiers as part of its copy product division.

> Copy product division • ColorEdge copier-duplicators • Ektaprint copier-duplicators • Ektaprint 1392 printers • IBM series of copiers (50-70-85).

Eastman Kodak Company 1989 Annual Report, p. 5.

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[1] A copy of Kodak's 1989 Annual Report has been lodged with the Court.

(29)

No. 90-1029

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC.; J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, D/B/A G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, D/B/A MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

Kodak's summary judgment motion demonstrated that Kodak's lack of market power in equipment markets restricted any possible exercise of market power in the alleged parts and service aftermarkets. Respondents countered that equipment competition was not "relevant." J.A. 339, 855.[1] Instead, they claimed that an alleged lock-in of past equipment customers gave Kodak market power over those customers. *Id.* This is how the case was presented to both the courts below and to this Court on the petition for *certiorari*.

In their brief on the merits, respondents finally admit the preeminent role of interbrand competition. They admit that (1) the equipment markets discipline the parts and service aftermarkets, (2) Kodak would lose "some new equipment customers" if it raised aftermarket prices and (3) Kodak's ability to profit from unreasonably high parts and service prices is dependent on competitive conditions in the interbrand markets. Resp. Br. 21-22, 34 (profitability depends on "demand elasticity for Kodak Equipment"). Those admissions are fatal to respondents' case – and explain why much of their brief is devoted to their new assertion that the equipment markets are *not* competitive. But since respondents never offered evidence of market power in the equipment markets, there is nothing in the record to support their new claim.

On this record, Kodak is entitled to summary judgment. The undisputed evidence demonstrates that

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[1] The abbreviations used here are the same as those in Petitioner's Brief on the Merits. In addition, "Resp. Br." refers to Respondents' Brief on the Merits, and "S.G. Br." refers to the Brief for the United States as *Amicus Curiae* Supporting Petitioner.

Kodak's customers buy equipment in vigorously competitive markets and consider the long term costs of that equipment. There is no record evidence of unusual circumstances that would shield Kodak from the effects of interbrand competition.

Given this record, reinstating summary judgment in no way establishes a rule of *per se* legality for aftermarket business practices, as respondents and their *amici* claim. To the contrary, it is entirely consistent with this Court's prior rulings that interbrand competition restricts the exercise of intrabrand market power and, thus, that interbrand competition is the core of vertical restraints analysis. Nor will reinstating summary judgment result in the dire consequences predicted by respondents. Rather, it will allow interbrand competition to work. Equipment manufacturers will adopt service strategies responsive to their customers' demands. Buyers will pay competitive prices for the total package of equipment, parts and service. In certain cases ISOs may need to seek alternate sources of parts, but that does not offend antitrust policy. Antitrust law is not intended to force manufacturers in competitive equipment markets to support competitors or subject them to years of expensive litigation if they do not.

The number of *amici*, and the associations and interest groups they represent, exemplify the vast array of potential plaintiffs and defendants that exist if the service strategies of all manufacturers of branded equipment are subject to antitrust challenge. The theories advanced by respondents and their *amici* threaten *every* manufacturer of service-intensive equipment with tying and monopolization liability – even the smallest in the most competitive equipment market. That is why reinstating summary judgment in this case is important. The Solicitor General is correct that "in antitrust cases, where losers in the

competitive marketplace may resort to protracted litigation that could deter legitimate conduct," summary judgment rules act "as a protector of competition." S.G. Br. 10. To protect competition and the freedom of firms in competitive markets to offer innovative service and marketing strategies that best meet their customers' demands, Kodak asks the Court to reverse the Ninth Circuit and reinstate summary judgment.

ARGUMENT

I. The Only Issue Before the Court Is Whether a Manufacturer Which Lacks Market Power Has a Duty to Sell Replacement Parts to ISOs.

Under this Court's summary judgment trilogy, Kodak is entitled to summary judgment unless the evidence respondents submitted in opposition to its motion raised a genuine issue of material fact.[2] Kodak's evidence established that the equipment markets in which it competes are robustly competitive. *See, e.g.*, J.A. 159 (micrographics) & 175-78 (copiers). Kodak also submitted evidence that purchasers of new equipment consider long term costs, including service costs, when selecting among competing equipment vendors. J.A. 161-62 (micrographics) & 183-84 (copiers). Among other things, Kodak introduced a representative trade press article that

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[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Once Kodak presented its evidence, respondents had the burden of coming forward with "significant probative evidence" of their claims. *Anderson*, 477 U.S. at 249 (*quoting First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). Under *Matsushita*, in a case like this one that makes no economic sense, respondents had the burden of presenting even "more persuasive evidence" to defeat summary judgment. 475 U.S. at 587.

explains to prospective copier customers how to assess the true economic costs, including service costs, of a copier. J.A. 205, 213-17.

After discovery, respondents did not challenge these facts, but rather advanced a theory of the case in which equipment competition was irrelevant. They claimed that existing Kodak equipment *owners* become "locked-in" to Kodak post-purchase, J.A. 339-40, 354-58, and that this gives Kodak market power in the alleged aftermarkets only. J.A. 345 ("Kodak Has Market Power In The Service Markets"), 397 ("market dominance" in parts). Respondents claimed that the "relevant question is actually whether Kodak equipment *owners* . . . can, as a practical matter, switch brands when faced with supra-competitive prices or conditions on Kodak service." J.A. 339 (emphasis in original); *see also* J.A. 855. In fact, respondents expressly agreed with Kodak that new equipment *buyers* would "shun an equipment seller whose parts and service are priced too high." J.A. 855. There is no probative evidence to the contrary.[3]

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[3] Respondents cannot explain away the lack of evidence in the record by any reference to limitations on discovery. Respondents were permitted market power discovery, but focused on other issues consistent with their theory of the case. In any event, respondents no longer seriously dispute Judge Schwarzer's discovery rulings. *See* Resp. Br. 1.

Significantly, respondents no longer rely on the conclusory testimony of one of the plaintiffs that, in his experience, customers do not engage in life cycle cost analysis when they purchase equipment. J.A. 429. The declarant had no foundation for this claim, since he was exclusively a service provider and had no experience selling equipment. J.A. 412. His testimony was, accordingly, inadmissible under Federal Rules of Evidence 602 (lack of personal knowledge) and 701 (lay opinion). Kodak lodged a timely objection to it. Record No. 46 at 9, 11.

Now that respondents have conceded the significance of competition in equipment markets, they have an insurmountable problem. They must argue that the interbrand markets are not competitive, when the only record evidence shows precisely the opposite. That dilemma explains respondents' attempts to offer new evidence, argue new market definition theories,[4] and raise claims they previously abandoned – all of which are improper in this Court. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970) (facts "not in the record of the proceedings below . . . [m]anifestly . . . cannot be properly considered by this Court"); *Granfinanciera, S.A. v. Nordberg*, 492 U.S.

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[4] Respondents have never claimed that any of the three product categories in which they now say Kodak has a high market share is in fact a relevant market, and there is no evidence that they are. To the contrary, the only record evidence regarding copiers is that high-volume copiers compete with mid-volume copiers, and that "there is no copier market in which Kodak is even the largest firm, let alone a monopolist." J.A. 176. For micrographics, the only evidence is that the product categories respondents cite "are not distinct markets," and indeed that micrographics equipment alone is not even a distinct market. J.A. 157-58. There is no evidence to support respondents' new "markets."

Based on events that post-date summary judgment, respondents claim that Kodak is now a duopolist in a high-volume copier market, and that its sole competitor, Xerox, has adopted a parts policy similar to Kodak's. Resp. Br. 16-17. Those claims are not true. *See, e.g.*, Brief *Amici Curiae* of the California State Electronics Ass'n *et al.* at 21, n.26 (1990 market data shows Canon, Konica and Mita are "closest competitor[s]" to Kodak in copier market segment); Resp. Br. 17, 1A (misstatement that Kodak acquired IBM "copier business" when annual report states Kodak only acquired ability to *service* IBM copiers). But since neither these "facts" nor their implications are before this Court – and are not properly the subject of judicial notice – no more need be said about them. *See, e.g., Garner v. Louisiana*, 368 U.S. 157, 173 (1961).

33, 39 (1989) (absent exceptional circumstances, respondent may not raise new arguments before this Court); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957) (contention made in District Court but not argued to Court of Appeals was waived).[5]

The issue presented by the record below, and the only issue before this Court, is whether Kodak, which indisputably faces a competitive market for new equipment sales, has a duty to sell parts to ISOs. Summary judgment on that issue on this record is required.

II. Kodak Cannot Exercise Market Power in Aftermarkets When It Lacks Market Power in Equipment Markets.

A. Respondents' Claim Is Inherently Implausible.

Analysis of this case begins with the question of whether it is plausible to believe that Kodak could profit from anticompetitive service strategies. *See* S.G. Br. 11. The answer is no. Interbrand equipment competition renders respondents' claims inherently implausible.

This Court addressed a conceptually identical issue in *Matsushita*. There the Court affirmed summary judgment because it found plaintiffs' theory of a predatory pricing conspiracy implausible. Central to this conclusion was the Court's recognition that, without "enough market power to set higher than competitive prices," defendants would likely never recoup the losses sustained in their below-cost pricing campaign. 475 U.S. at 590. The existence of a formula for a successful predation strategy (gains > losses) was not the issue. Formulas always exist. The problem the Court recognized was that without

[5] Respondents' statement of the questions presented by the *certiorari* petition confirms that they conceded the existence of interbrand competition and abandoned both rule of reason and conspiracy claims. *See* Brief in Opp. to Pet. for *Cert.* at i.

market power it was implausible for the alleged conspirators to come out ahead in the long run.

Here the alleged sequence of predation/recoupment is reversed, but the analysis is the same. Because Kodak faces concededly competitive equipment markets, it cannot plausibly expect that any short term gain from an anticompetitive service strategy will exceed its long term losses. Respondents concede as much when they admit that Kodak's ability to profit from such a strategy is dependent on "demand elasticity for Kodak Equipment," *i.e.*, the inclination of customers to buy other manufacturers' equipment if Kodak's prices increase. Resp. Br. 22, 34. Without market power, the "demand elasticity for Kodak Equipment" is necessarily high. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 939-43 (1981). Thus, Kodak could not hope to maintain its equipment sales or its overall profitability by supercompetitively pricing service.

If anything, respondents' theory is even less plausible than the claim in *Matsushita*. Kodak cannot play the "waiting game" as in *Matsushita*. Rather, since Kodak is simultaneously selling new equipment and servicing old equipment, respondents' theory requires Kodak to charge supercompetitive service prices to one group of customers while at the same time offering competitive package prices to others. Resp. Br. 20-22.

Respondents have never explained how that is possible given the existence of sophisticated repeat buyers in an environment of rapidly changing technology. J.A. 163, 355, 454. Nor have respondents ever produced any evidence that Kodak actually engages in this or any other of the various price discrimination strategies that it claims Kodak hypothetically "could exploit." *See* Resp. Br. 20-21 & n.14 (seven usages of "could").[6] Finally, respondents

[6] Respondents ignore Kodak's "Copy Products Price Schedule," the comprehensive statement of Kodak's uniform

(Continued on following page)

never deal with the fact that depressing equipment sales will ultimately depress service revenues too. *See* J.A. 162 (anticompetitive service strategy "would ultimately hurt . . . service revenues since future service revenues are heavily dependent on present equipment sales").[7]

Respondents gloss over these issues and try instead to shift the burden to Kodak to prove that it could not exploit customers. *See, e.g.*, Resp. Br. 35 n.24 (contending that Kodak's contrary claim is "unsupported by this record"). Under this Court's summary judgment decisions, however, that burden was respondents', not Kodak's. *Anderson*, 477 U.S. at 250; *Celotex*, 477 U.S. at 324-25. Since respondents did not meet their burden, Kodak was entitled to summary judgment.

B. Respondents' Consumer Ignorance Theory Is Unsupported by the Record and Economically Flawed.

Respondents and several *amici* contend that imperfect consumer decisionmaking is enough to permit manufacturers without market power to charge supercompetitive

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(Continued from previous page)

prices and terms for copier products and service. L075-100. Respondents also repeatedly miscite the record (Resp. Br. 20, 36, 42, 46) in claiming that Kodak raised service prices after allegedly changing its parts practices. There is no record evidence that Kodak raised prices. *See* J.A. 162-63, 667-68.

[7] At most, respondents speculate that a hypothetical formula may exist such that a firm facing interbrand competition might succeed in the short run by pricing its service and parts supercompetitively to "locked-in" and uninformed customers only. But that does not rebut the inherent implausibility of respondents' claim. It simply defines a possible "unusual case" and moves the analysis to the second question – whether respondents have persuasive evidence demonstrating that, despite the contrary presumption, Kodak's conduct is in fact anticompetitive. *See* S.G. Br. 11. There is no such evidence.

prices in aftermarkets. This Court squarely rejected the same "market imperfections" argument in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 (1984).

1. There Is No Record Evidence of Market Imperfections.

Unlike this case, the record in *Jefferson Parish* included significant evidence of actual market imperfections. *Id.* at 27-28 (imperfect information and third party payors). There was even a Congressional finding that the imperfections existed. *Id.* at 27 n.45. Nonetheless, the Court held that those market imperfections did "not generate the kind of market power that justifies condemnation of tying." *Id.* at 27.

Here, there is no evidence of any unusual constraints on consumer decisionmaking, such as the third party payor issue.[8] Indeed, there is uncontroverted evidence that copier and micrographics purchasers consider long term costs when making purchasing decisions. J.A. 161-62, 183-84, 205, 213-17. Respondents also admit that prospective buyers can and do "shun an equipment seller whose parts and service are priced too high." J.A. 855. That admission is dispositive. It shows that consumer information, whether or not it is "perfect" in these markets, is more than adequate for competition to work.

Despite that admission, respondents now contend that Kodak made it harder for customers to calculate long term costs by either changing its parts policies after they purchased Kodak equipment or by not informing them of Kodak's unwillingness to sell parts to ISOs. Resp. Br. 5-11. These new contentions are specious.

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[8] Thus, the concerns of the automobile insurance industry are unfounded. *See, e.g., Amici Curiae* Brief for State Farm Mutual Automobile Ins. Co. *et al.* at 20. This case simply does not present the third party payor issue which is at the core of these *amici's* arguments.

First, respondents cite no evidence that any customer was actually confused about the price of service. Respondents merely speculate that confusion may have resulted because Kodak changed its parts practices. But the undisputed evidence shows that Kodak did not change its parts practices retroactively. When Kodak changed its micrographics parts practices in 1985, it grandfathered parts for all existing Kodak equipment.[9] As for copiers, Kodak never knowingly sold copier parts to ISOs.[10]

Likewise, there is no support in the record for respondents' claim that Kodak customers "likely expected aftermarket competition," and thus that Kodak misled them by not trumpeting its refusal to sell ISOs

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[9] J.A. 166 ("with respect to parts that we had historically sold to anyone, *i.e.*, parts for our older products, we would continue to do so"); *see also* J.A. 151-54 (the Kodak memorandum stating the policy). Respondents cite L125 as the evidence showing unavailability of pre-1985 micrographics parts. Resp. Br. 10. L125 concerns copiers, not micrographics, and says nothing about restrictions on parts.

[10] Kodak adopted its copier parts policy when it entered the copier industry in 1975, and there has been no significant change in it since. J.A. 184-85. No doubt some ISOs bought copier parts from Kodak despite Kodak's policy (Resp. Br. 4); indeed, there is evidence that an ISO was able to buy parts using the name of his dog. J.A. 474. But these anecdotes show only that Kodak could not enforce its policy with 100% effectiveness. Kodak did not change the rules on its existing copier customers at any time.

One plaintiff claims that Kodak told him he could purchase copier parts. J.A. 415. If so, that is irrelevant. Respondents' tying theory requires that Kodak told its copier customers, not ISOs, that ISOs would be supplied with parts. Since there is no evidence that Kodak ever did that, there is no basis for postulating that Kodak fooled its customers in any way.

parts. Resp. Br. 10-11. Assuming any duty to disclose,[11] there is no evidence that buyers had such an expectation. To the contrary, the record shows that independent service was insignificant in the micrographics market until shortly before Kodak's policy went into effect, J.A. 726-27, and is still insignificant in the copier market. J.A. 516 (only four ISOs service Kodak copiers nationwide), 430, 514 (fewer than ten). The record does not support respondents' consumer ignorance theory in any of its varied forms.

2. A Theory of Imperfect Consumer Information Is Not an Adequate Substitute for a Showing of Market Power.

At bottom, respondents and their *amici* seem to argue that *Jefferson Parish* was wrong in its conclusions that market imperfections, such as imperfect consumer information, do not "force[ ] purchases that would otherwise not be made" and "do not generate the kind of market power that justifies condemnation of tying." 466 U.S. at 27. Respondents' argument boils down to the proposition that market power is unnecessary absent a showing that purchasers are perfectly informed about long term costs.

Antitrust law does not guarantee purchasers perfect information. Nor does it penalize sellers by subjecting them to *per se* tying and monopolization liability if purchasers are not perfectly informed. There is never perfect consumer information. Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630, 630 (1979).

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[11] Respondents cite no authority for the proposition that one competitor must inform customers of the products available from other competitors and, of course, there is none. The very notion makes no sense. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 377 (7th Cir. 1986) (Posner, J.), *cert. denied*, 480 U.S. 934 (1987).

Consequently, a market imperfections exception to the market power rule is no exception at all. It swallows the rule.[12]

To accept respondents' consumer ignorance theory, the Court would not only have to overlook the record, it would have to overrule *Jefferson Parish*. The Court should decline the invitation.

C. A Theory of Post-Sale "Lock-Ins" Typical of Durable Goods Does Not Substitute for a Showing of Market Power.

The lock-in theory that was respondents' central argument in the District Court and before the Ninth Circuit is largely forgotten in their merits brief. *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985), which has always been respondents' principal authority, and upon which the Ninth Circuit majority relied, is no longer even cited. That omission is a telling admission that the lock-in theory is groundless. *See* 9 P. Areeda, *Antitrust Law* ¶ 1703 at 43 (1991) ("the time to [assess market power] is not after a customer has been allegedly 'locked-into' an arrangement but before he entered it"); *see also Jefferson Parish*, 466 U.S. at 28 (noting that patients preferring not to be locked into an exclusive anesthesiology provider would "go to another hospital where they can utilize the services of the anesthesiologist of their choice").

[12] The fact that respondents and their *amici* can claim imperfect information in markets for the sale of expensive equipment to sophisticated business customers proves the point. *See* 9 P. Areeda, *Antitrust Law* ¶ 1712 at 145 (1991) ("[s]ophisticated business purchasers of technologically advanced and complex equipment are presumably more sensitive [than average consumers] to future maintenance and repair prices"). Moreover, the record demonstrates that copier and micrographic equipment purchasers account for long term costs, J.A. 205, 213-17, and that Kodak prices its products expecting them to do so. J.A. 194-95, L001-039.

Respondents hypothesize that a manufacturer might forego new equipment sales in reliance on service profits from lock-ins. Resp. Br. 33-35. But, once again, respondents fail to meet their burden of showing with any evidence, let alone persuasive evidence, that any gain Kodak could achieve by exploiting its existing customers would outweigh the losses from lost equipment sales. Their lock-in theory fails on that ground too.

D. The Fiction of a Parts or Service Aftermarket Cannot Bestow Market Power on Firms Constrained by Equipment Market Competition.

Respondents also argue that merely by defining Kodak parts and service as "markets," they can avoid any analysis of the impact of equipment market competition on those aftermarkets. Resp. Br. 28-32. The argument is an empty tautology which should be firmly rejected.

The process of market definition is meant "not to . . . obscure competition, but to 'recognize competition where, in fact, competition exists.' " *United States v. Continental Can Co.*, 378 U.S. 441, 453 (1964), *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962). Therefore, any definition of the relevant market that permits a court to ignore competition that significantly constrains the exercise of market power is flawed. Yet the constraint of equipment competition is precisely what the fiction of relevant parts and service "markets" is intended to ignore.

Respondents admit they are trying to ignore interbrand competition by baldly asserting that "the definition of a market necessarily implies the possibility of its being monopolized." Resp. Br. 25. Their syllogism is that since, by hypothesis, a service market can be monopolized, neither interbrand equipment competition nor anything

else "outside the market" can make it otherwise. *See* Resp. Br. 39-40 ("competition in equipment markets is beside the point").

The premise that all "markets" can be monopolized is simply false. This Court has recognized, for example, that markets without entry barriers cannot be monopolized or be subject to supracompetitive pricing. *Matsushita*, 475 U.S. at 591 n.15 ("without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time").[13] Similarly, this Court has noted that interbrand competition "provides a significant check on the exploitation of intrabrand market power." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977). *See also Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725 (1988). In both circumstances, something ostensibly outside the market protects against supercompetitive pricing.

Interbrand equipment competition must be factored into the Court's analysis of this case. There are two choices. The Court can integrate the factor into market definition and conclude, on the ground that a market which cannot be exploited is not really a market, that parts and service are not relevant markets.[14] Or the Court can assume the existence of these markets and recognize,

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[13] *See also American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1320-21 (7th Cir. 1991) (Posner, J.); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987 (D.C. Cir. 1990) (Thomas, J.).

[14] This approach to market definition is adopted to a significant degree by the Department of Justice's 1984 Merger Guidelines, 49 Fed. Reg. 26,823 (June 29, 1984), which expand the definition of the market to include most forces that prevent the exercise of market power. *See, e.g.*, § 2.21 (firms which could potentially enter the market in the short term are assumed to be within the market and assigned a market share).

much as entry barrier analysis proceeds, that firms constrained by equipment competition cannot exercise market power in aftermarkets.

Kodak has advocated the latter course because it believes the fact of active interbrand equipment competition establishes the absence of power in the aftermarkets far more directly than market definition semantics ever can. *See* 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 507 at 330 (1978) ("[m]arket definition becomes crucial only when there are no other discoverable facts establishing the existence and degree of market power more directly."). But it does not matter which course the Court chooses so long as interbrand competition is not ignored. Either way, Kodak is entitled to summary judgment.[15]

III. Kodak's Parts Practices Are Not a *Per Se* Unlawful Tying Arrangement.

Respondents' only tying claim is for a *per se* violation. Despite their contrary assertions, respondents waived any rule of reason tying claim, as the Court of Appeals held. Pet. App. 4A n.1. Until their merits brief, respondents never once assessed Kodak's conduct under the

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[15] Respondents also elevate semantics over substance in defining the alleged tie. If this is a tying case at all, the tie at issue is equipment-to-service, not parts-to-service as alleged. Respondents' true complaint is that Kodak effectively forces its equipment customers to buy service contracts, thereby foreclosing competition from ISOs. Parts enter the picture only as the means to the alleged end. Why then, do respondents not allege an equipment-to-service tie? Because if they were ever to be that candid, they could not possibly dispute the necessity of proving, under *Jefferson Parish*, Kodak's market power in the equipment markets. Respondents have no proof of that power, so they try to avoid the issue through the "semantic shell game" that the two product issue has become. *See Casey v. Diet Center, Inc.*, 590 F. Supp. 1561, 1565-66 & n.4 (N.D. Cal. 1984) (Schwarzer, J.).

rule of reason. *See* J.A. 390-401 (District Court briefing), 758-76 (Ninth Circuit briefing).[16]

Per se condemnation is reserved for business conduct that is plainly anticompetitive. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979) ("*BMI*"); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646 (1980). It is applied only to practices that "always or almost always tend to restrict competition and decrease output." *BMI*, 441 U.S. at 19-20. If "facts peculiar to the business to which the restraint is applied" must be assessed before "form[ing] a judgment about the competitive significance of the restraint," the rule of reason, not the per se rule, applies. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

Kodak's parts practices cannot be summarily condemned as illegal *per se*. Respondents themselves (along with their new economist) claim that the "overall profitability" of Kodak's conduct depends on a complex economic calculus including "the size of Kodak's installed base relative to annual sales, demand elasticity for Kodak Equipment, prices [and] costs." Resp. Br. 34. Market power must also be assessed, along with adverse effects in the tied product market and business justifications. *Jefferson Parish*, 466 U.S. at 11-18. These factors, both

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[16] Respondents' claim that they argued a rule of reason tying case in the District Court is disingenuous. *See* Resp. Br. 40-41 n.28. They quote the first part of a paragraph from their brief that tying "may receive a rule of reason analysis under Section 1," but omit the second part that limited their argument to the "usual[ ] challenge[ ]" of "*per se* violations of Section 1." J.A. 390. Moreover, respondents' opposition to the petition for a writ of *certiorari* raised only "their *per se* claim under section 1 of the Sherman Act. . . ." Brief in Opp. to Pet. for *Cert.* at i. They never claimed the Ninth Circuit erred in ruling they had waived their rule of reason claim. Of course, as respondents admit, even a rule of reason claim requires evidence of market power. Resp. Br. 41. Thus, Kodak's lack of market power also defeats a rule of reason tying claim.

individually and collectively, are inherently foreign to *per se* analysis, and evidence relating to them may not even be admissible in defense of a genuine *per se* claim. *See* ABA Antitrust Section, *Antitrust Law Developments* 22 (2d ed. 1984) ("the per se rule forecloses any analysis of the . . . nature, extent and degree of market effect").

Whether the Court chooses to maintain dual legal standards for assessing tying arrangements or not, Kodak's conduct ought not to be subjected to *per se* liability. Kodak does not have the market power required for *any* tying violation, and certainly not for one warranting *per se* condemnation.

IV. Kodak's Refusal to Deal Does Not Constitute Monopolization Under *Aspen*.

Respondents claim that under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), a monopolist cannot withdraw from a "cooperative relationship" if it is efficient. There are two short answers to this: (1) Kodak is not a monopolist, and (2) Kodak has never been party to a "cooperative relationship" with ISOs. At most, Kodak had an ordinary buyer-seller relationship with a few ISOs prior to 1985, in that it sold them micrographics parts. That is nothing like the joint marketing agreement in *Aspen*. In any event, Kodak will still sell pre-1985 micrographics equipment parts to ISOs. J.A. 151-54, 166-67, 734.

Further, as a matter of law, neither Aspen nor any of this Court's other refusal to deal cases compel dealings with rivals in these circumstances. Even monopolists are free not to deal with rivals unless (1) there is an economically sound basis for application of the "essential facilities" doctrine (which respondents no longer claim there is), or (2) the refusal to deal is predatory in the sense that it lacks any legitimate justification and instead "sacrifice[s] short-run benefits and consumer goodwill in

exchange for a perceived long-run impact on its smaller rival." *Aspen*, 472 U.S. at 610-11. Here, Kodak's emphasis on high quality service is the epitome of a legitimate business justification, *see* 9 P. Areeda, *Antitrust Law* ¶ 1703g at 50-51 (1991), and its refusal to aid free riding is anything but predatory. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984) (manufacturers may properly take steps "to see that 'free-riders' do not interfere"). In short, Kodak lacks monopoly power and has no legal duty to deal with ISOs. Its refusal to deal does not constitute monopolization.

V. Respondents Waived Any OEM Conspiracy Claim.

Respondents' claim that Kodak conspired with OEMs to deny ISOs parts, Resp. Br. 44-46, is not before this Court. Respondents waived that claim by not appealing from the District Court's dismissal of it.

In the District Court, respondents contended that Kodak conspired with original equipment manufacturers to deny ISOs non-patented parts, and that this conspiracy was illegal *per se* under *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). J.A. 401-02. Literally all of the evidence respondents cited in support of this claim was hearsay, *see* J.A. 365, 429, 468, 496, and Kodak objected to it.[17] Record No. 46, *citing inter alia*, Fed. R. Civ. Proc. 56(e) (opposition to summary judgment must be supported by admissible evidence). In addition, Kodak noted that any such agreements would be "paradigm vertical arrangement[s]" subject to the rule of reason, not

[17] Even the hearsay evidence showed the respondents could obtain Kodak parts from some OEMs, J.A. 457-58, 490, 496, and that Kodak parts are available from disassembly of used equipment. J.A. 426. Respondents also admit that used Kodak equipment is extremely inexpensive, J.A. 733, which makes it an economical source of parts.

the *per se* rule. J.A. 699. Judge Schwarzer held that respondents' evidence of the alleged OEM conspiracy was indeed hearsay and thus that they had failed to raise triable issues regarding that claim. Pet. App. 32B.

When respondents appealed from the entry of summary judgment, they did not appeal from the conspiracy decision. None of respondents' three issues presented for review raised the conspiracy claim, J.A. 720-21; they never cited *Klors* or similar group boycott cases, J.A. 718-19; they never challenged Judge Schwarzer's hearsay ruling; and, with the exception of three sentences that were carried over verbatim from respondents' District Court papers, *compare* J.A. 738-39 *with* J.A. 365, they never mentioned the subject of conspiracy. Rather, they argued *per se* tying and monopolization. J.A. 747-86. Kodak even pointed out that respondents no longer pursued the conspiracy claim. J.A. 834. Respondents replied solely by contending that Kodak had agreements with its *customers* not to resell to ISOs (the alleged tying arrangements themselves). J.A. 857-58. Respondents said nothing about agreements between Kodak and OEMs. Accordingly, the Ninth Circuit did not address any alleged conspiracy with OEMs. Like respondents, the Ninth Circuit mentioned concerted action only in the context of tying. Pet. App. 15A.[18]

Respondents cannot revive their OEM conspiracy claim in this Court. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"); *accord County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 (1985); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). In any

[18] In addition, respondents neither cross-petitioned for *certiorari* on the conspiracy claim nor raised the claim in their brief in opposition to Kodak's petition.

event, the conspiracy claim fails. Respondents rely solely on hearsay, and Judge Schwarzer's evidentiary ruling remains unchallenged even now. *See* Resp. Br. 44-46. Moreover, because respondents now admit that a conspiracy with OEMs would be subject to the rule of reason under *GTE Sylvania*, Resp. Br. 44, Kodak's undisputed lack of interbrand market power also would dispose of this claim. *See, e.g., Assam Drug Co., Inc. v. Miller Brewing Co., Inc.*, 798 F.2d 311, 315-16 (8th Cir. 1986).

CONCLUSION

For the reasons stated above and in Kodak's brief on the merits, the Ninth Circuit's decision should be reversed and summary judgment in favor of Kodak reinstated.

Respectfully submitted,

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No. 90-1029

In the Supreme Court of the United States

OCTOBER TERM, 1991

EASTMAN KODAK COMPANY, PETITIONER

v.

IMAGE TECHNICAL SERVICES INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in reversing a grant of summary judgment for a defendant equipment manufacturer alleged to have committed a violation of Section 2 of the Sherman Act and a per se violation of Section 1 by denying independent service organizations access to replacement parts for its equipment and by tying parts to service, when the manufacturer concededly lacked market power in the market for equipment.

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INTEREST OF THE UNITED STATES

The United States is principally responsible for the enforcement of the Sherman Act, 15 U.S.C. 1 and 2. In this case, an equipment manufacturer lacking market power in the markets for its equipment refused to sell replacement parts to independent service organizations. The independent service organizations alleged that, by refusing to sell parts to them, the manufacturer had unlawfully tied the sale of service for its equipment to the sale of parts, in violation of Section 1, and had attempted to monopolize the sale of service for its equipment, in violation of Section 2. The resolution of this case implicates the pro-competitive policies embodied in the antitrust laws, and the United States has a strong interest in the proper interpretation of those laws.

STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. 1 and 2, provides:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT

1. Petitioner Eastman Kodak Co. ("Kodak") manufactures and sells copiers and micrographic equipment.[1] Kodak accounts for 23% of the market for high volume photocopy machines and less than 20% of the micrographic machine market. Pet. App. 8A n.3. It also sells service and replacement parts for its machines. Respondents are independent service organizations ("ISOs"). In the early 1980s, ISOs began buying parts from Kodak and competing with it in servicing Kodak machines, sometimes offering significantly lower prices. See *id.* at 3A, 10A.

[1] Micrographic equipment is used in connection with microfilm and microfiche.

In 1985 and 1986, Kodak implemented a policy of selling replacement parts for new micrographic machines only to buyers of Kodak machines who do not purchase repair services from ISOs. That is, Kodak sells parts for micrographic machines sold after 1985 only to buyers who either repair their own machines or use Kodak service. Kodak also has a policy of not selling copier parts to ISOs; it claims never knowingly to have done so. Pet. App. 30B. The ISOs allege, however, that in the past some ISOs purchased copier parts directly from Kodak. Br. in Opp. 3 n.3.

Kodak contends that these policies are intended (i) to allow it to be responsible for the quality of service for Kodak machines, which enables it better to compete in the equipment markets by maintaining a continuing relationship with customers for its machines and protecting its reputation for quality; (ii) to reduce its parts inventories and inventory costs; and (iii) to prevent the ISOs from free-riding on Kodak's investments in the machine industries. Pet. App. 13A; Pet. 5. A direct and intended effect of the policy is to make it more difficult for ISOs to sell service for Kodak machines.

2. In 1987, a number of ISOs brought this action, alleging that Kodak had unlawfully tied the sale of service for Kodak machines to the sale of parts, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and had unlawfully monopolized and attempted to monopolize the sale of service for Kodak machines, in

violation of Section 2 of the Sherman Act, 15 U.S.C. 2.[2] Pet. App. 29B.

After allowing abbreviated discovery, the district court granted summary judgment for Kodak. As to the Section 1 claim, the court found no evidence of a tying arrangement because, it said, Kodak neither required equipment buyers to purchase parts or service nor conditioned the sale of one product on the purchase of another product. Pet. App. 32B-33B. As to the Section 2 claim, the court first noted that "[p]laintiffs do not contend Kodak possesses monopoly power in the new equipment market in which it competes with Xerox, IBM, Bell and Howell, 3M and various Japanese manufacturers and holds no significant share." *Id.* at 35B. In that circumstance, the court concluded that although Kodak had a "natural monopoly over the market for parts it sells under its name" (*ibid.*), a unilateral refusal to sell those parts to ISOs did not violate Section 2.

3. A divided panel of the Ninth Circuit reversed.

a. With respect to the Section 1 claim, the court concluded that a tying agreement existed because Kodak had conditioned the sale of its parts on the buyer's agreement not to buy service from the ISOs. Pet. App. 5A-6A, citing *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5-6 (1958).[3] If Kodak had "sufficient economic power in the tying product market [parts] to restrain competition appreciably in the tied product market [service]," the court stated,

[2] Additional related claims were not considered by the court of appeals.

[3] The court recognized that there could be an unlawful tie between parts and service only if the two were distinct markets. It held that whether parts and service were one market or two presented a disputed issue of fact. Pet. App. 6A.

such a tying arrangement could be unlawful per se.[4] Pet. App. 4A. But since tying is not unlawful per se in the absence of market power over the tying product, *Jefferson Parish Hosp. Dist. No. 3* v. *Hyde*, 466 U.S. 2, 12-18 (1984), the court recognized that the ISOs had to prove that Kodak has power in the parts market.

It was not disputed that Kodak lacks market power in the markets for its equipment. In addition, the court recognized that potential equipment buyers "consider the cost of parts and service when initially deciding between Kodak's equipment and its competitors' equipment." Pet. App. 8A.[5] In those circumstances, the court saw merit in Kodak's argument that it could not have market power in the market for parts for its equipment, since an attempt to charge supracompetitive parts prices would self-defeatingly cause potential equipment purchasers to purchase competitors' equipment rather than Kodak's equipment. *Ibid.*

The court nevertheless refused to affirm the grant of summary judgment "on this theoretical basis." Pet. App. 10A. It thought that Kodak might be

[4] Because the ISOs had not relied on the rule of reason in opposing summary judgment in the district court, the court of appeals limited its analysis under Section 1 to whether the tying arrangement was unlawful per se. Pet. App. 4A n.1.

[5] In their supplemental brief filed in opposition to the petition for a writ of certiorari (at 2), the ISOs disagreed with the court of appeals' statement that equipment buyers consider the cost of parts and service in deciding which brand of equipment to buy. But all three judges on the court of appeals thought that there was no dispute on this point. Pet. App. 8A, 20A. In any event, as we explain below, the proper resolution of this case does not turn on whether some buyers fail to consider all relevant costs.

found to have sufficient power in the parts market from evidence that (i) it charged more than the ISOs for service that was of lower quality; (ii) competition from the ISOs drove down Kodak's service prices; and (iii) some customers paid higher prices for Kodak's service rather than switch to other equipment. *Id.* at 10A-11A. Moreover, the court said that "[s]ome strength in the interbrand [equipment] market, although short of actual market power, can combine with other factors to yield power in an after-market." *Id.* at 12A. The court stated that "market imperfections can keep economic theories * * * from mirroring reality" (*id.* at 10A), although it did not suggest what specific market imperfections or other factors might result in market power in this case.[6] The court held that "[t]he district court improperly granted summary judgment on the Section 1 claim." *Id.* at 15A.

Judge Wallace dissented on the ground that a lack of power in the equipment markets necessarily precluded a finding of market power in the parts markets. Pet. App. 23A. He explained that any attempt by Kodak to price service or parts supracompetitively would evidence "a self-destructive pricing strategy which lacks long-term effects upon competition." *Ibid.* In light of the ISOs' (and the majority's) failure to describe what market imperfections might exist to invalidate that conclusion (*id.* at 22A n.1), Judge Wallace concluded that the district court properly granted summary judgment on the tying claim.

[6] Because a tying arrangement that is otherwise unlawful may be saved by legitimate business reasons if no less restrictive alternative is available, the court considered Kodak's justifications for its policy. The court concluded that the trier of fact might find the product quality and inventory reasons to be pretextual and that there was a less restrictive alternative for achieving Kodak's quality-related goals. It held that Kodak's desire not to permit ISOs to benefit from Kodak's investments in the equipment markets could not, as a matter of law, justify the policy. Pet. App. 13A-14A.

b. As to the Section 2 claim, the court found sufficient evidence to support a finding that Kodak's implementation of its parts policy was anticompetitive and exclusionary and showed a specific intent to monopolize. Pet. App. 17A. It first refused to hold "as a matter of law that service of Kodak equipment is not the relevant market in this case." *Id.* at 19A. It then recognized the "logical appeal in Kodak's theory that it could not have monopoly power * * * in the service market since it lacks economic power in the interbrand [equipment] markets." *Ibid.* But the court found that the evidence of monopoly power the ISOs had presented—that some ISOs charged less than Kodak for service, that competition drove Kodak's service prices down, and that some customers paid Kodak's higher service charges rather than switch to other equipment (*id.* at 10A-11A)—was sufficient to withstand summary judgment. It also held that the ISOs had come forward with sufficient evidence, for purposes of summary judgment, to satisfy their burden of proving the lack of legitimate business justification. *Id.* at 18A; see also *id.* at 17A n.9.

Judge Wallace dissented with respect to the monopolization claim as well. He concluded that, entirely apart from market power considerations, Kodak was entitled to summary judgment because it had "submitted extensive and undisputed evidence of a marketing strategy based on high-quality service." Pet. App. 25A.

SUMMARY OF ARGUMENT

In *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), this Court held that where the factual context renders an antitrust claim "implausible—if the claim is one that simply makes no economic sense," in responding to a motion for summary judgment the plaintiff must show that the defendant's behavior is not as consistent with permissible, competitive behavior as with unlawful behavior. The court of appeals failed to follow that approach in this case.

The ISOs' claims are implausible because Kodak lacks market power in the markets for its copier and micrographic equipment. Buyers of such equipment regard an increase in the price of parts or service as an increase in the price of the equipment, and sellers recognize that the revenues from sales of parts and service are attributable to sales of the equipment. In such circumstances, it is not apparent how an equipment manufacturer such as Kodak could exercise power in the aftermarkets for parts and service.

The evidence that the ISOs have presented is inadequate to show that reality departs from theory in this case. The fact that there is evidence that some ISOs underprice Kodak does not show that Kodak has violated Section 2 of the Sherman Act by unlawfully exercising monopoly power. Rather, such evidence is fully consistent with other explanations, such as that Kodak is spreading the cost of the equipment over time. Nor does the fact that some purchasers of Kodak equipment cannot immediately switch to other equipment show that Kodak can exercise monopoly power. As Judge Wallace explained, focusing exclusively on customers who have already purchased equipment is unrealistic because manu-

facturers will suffer in the competitive equipment markets if they exploit purchasers of their equipment.

Nor does the evidence presented by the ISOs show the existence of a tying arrangement that may be condemned as unlawful per se under Section 1. In *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 7, 25 (1984), this Court considered a similar case where a hospital had entered into an exclusive arrangement with anesthesiologists, and held that a tying arrangement is per se unlawful only where the seller's market power forces the buyer to purchase the tied product. The Court found no market power in that case on the basis of the hospital's 30% market share (*id.* at 26-27), which is considerably higher than Kodak's share of the equipment markets. Moreover, the Court's analysis was unaffected by customers who were locked into the hospital's services because they had already checked into the hospital. Indeed, the Court recognized that prospective patients who want to choose their own anesthesiologist will use another hospital (*id.* at 28), just as buyers of copiers and micrographic equipment who prefer to obtain service from ISOs will choose other brands of equipment.

Thus, the evidence that has been presented does not show that Kodak's behavior is inconsistent with the implementation of a permissible, competitive marketing strategy. Accordingly, the court of appeals erred by holding on the record before it that the ISOs had raised a triable issue.

ARGUMENT

SUMMARY JUDGMENT WAS PROPER ON THIS RECORD BECAUSE THE ISOs' CLAIMS ARE IMPLAUSIBLE AND THE EVIDENCE ON WHICH THE COURT RELIED IS CONSISTENT WITH PERMISSIBLE COMPETITION

Rule 56 of the Federal Rules of Civil Procedure requires the opponent of summary judgment to "set forth specific facts showing that there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The rule, of course, serves the interests of judicial efficiency. But in antitrust cases, where losers in the competitive marketplace may resort to protracted litigation that could deter legitimate conduct (*Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-764 (1984)), the rule assumes particular importance as a protector of competition. Thus, this Court held in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), that if the factual context renders the claim "implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." [7]

Under *Matsushita*, it is not enough for a party opposing summary judgment to present evidence that, although consistent with its antitrust theory, is also consistent with lawful, competitive behavior. That party must provide enough evidence to enable a rational trier of fact to reject the alternative explanation of economically sensible and lawful con-

[7] As the Ninth Circuit has recognized, this principle applies in other areas of the law as well. See *California Architectural Building Prods., Inc.* v. *Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (1987) (fraud).

duct. Thus, in *Matsushita* the Court held that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588. So too, evidence as consistent with permissible competition as with the exclusionary exercise of market power should not, standing alone, support an inference of monopolization or unlawful tying.

The court of appeals lost sight of these principles in reversing the grant of summary judgment. It should have considered, first, whether the ISOs' claims are plausible, and concluded that they are not plausible as a theoretical matter because the claims are based on the proposition that Kodak has market power in the parts market, a proposition that is inconsistent with the fact that Kodak lacks market power in the equipment market. Under *Matsushita*, the court should have considered whether the ISOs had presented evidence showing that this is an unusual case such that Kodak nevertheless has market power in the parts market and has used that power to exclude ISOs from the service market. Since the evidence does not show that this is an unusual case—but is fully consistent with Kodak's claims that it has been following a permissible marketing strategy—the court of appeals should not have concluded that the ISOs presented sufficient evidence to avoid summary judgment.[8]

[8] Since the court of appeals found the ISOs' evidence sufficient to withstand summary judgment, it did not specifically determine (see Pet. App. 10A & n.4) whether the ISOs had been given an "adequate time for discovery" (*Celotex Corp* v. *Catrett*, 477 U.S. 317, 322 (1986)) prior to the award of summary judgment against them by the district court. Accordingly, this Court need not consider in the first instance respondents' complaints (Br. in Opp. 11-13) about the limita-

A. It Is Implausible That Kodak, Which Lacks Market Power In Equipment Markets, Nonetheless Has Power In Markets For Parts For Its Equipment

The essence of the ISOs' claims is that Kodak attempted to use its monopoly over *parts* for its equipment to monopolize the market for service of its equipment by tying service to parts.[9] Thus, to establish liability under Section 1 or Section 2 of the Sherman Act in this case, the ISOs must prove that Kodak had market power in the market for parts for Kodak equipment. *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 12-18 (1984); *Richter Concrete Corp.* v. *Hilltop Concrete Co.*, 691 F.2d 818, 827 (6th Cir. 1982).[10]

In our view, the key fact in this case is that Kodak lacks market power in the markets for its equip-

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tions imposed on discovery. That issue should be addressed on remand by the court of appeals in light of this Court's determination of the applicable substantive rules to be applied to respondents' Sherman Act claims.

[9] The ISOs told the court of appeals that their claims rested on Kodak's alleged "monopoly power over the tens of thousands of copier and micrographic equipment replacement parts it makes or has made." ISO C.A. Reply Br. 16. Similarly, the ISOs told this Court that the "key issue" for both their Section 1 and their Section 2 claims is "whether Kodak enjoys sufficient economic power in the *parts* market." Br. in Opp. 21 (emphasis added).

[10] We assume for the sake of argument that parts for the machines of a single manufacturer may constitute a relevant market. But see, *e.g.*, *International Logistics Group, Ltd.* v. *Chrysler Corp.*, 884 F.2d 904, 908 (6th Cir. 1989), cert. denied, 494 U.S. 1066 (1990); *General Business Sys.* v. *North American Philips Corp.*, 699 F.2d 965, 975 (9th Cir. 1983); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 278-286 (5th Cir. 1978) (service), cert. denied, 440 U.S. 939 (1979).

ment.[11] Because it lacks power in the equipment markets, it is implausible that it could exercise market power in an aftermarket for replacement parts for Kodak equipment. From the standpoint of the buyer, both the price of the equipment and the price of parts and service over the life of the equipment are expenditures that are necessary to obtain copying and micrographic services. From the standpoint of a manufacturer that sells parts for its equipment and services its equipment, what the buyer pays for all three is revenue ultimately resulting from sales of the equipment.

In a situation such as this one, a buyer rationally regards an increase in the price of parts and service needed over the life of the equipment as an increase in the price of the equipment. Thus, the court of appeals correctly recognized that "equipment purchasers would turn to one of Kodak's competitors if Kodak tied supercompetitively priced parts or service directly to equipment." Pet. App. 9A. Similarly, as the court of appeals also recognized (*ibid.*), "equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts." See also *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792, 796-798 (1st Cir. 1988); *General Business Sys.* v. *North American Philips Corp.*, 699 F.2d 965, 974-975, 977 (9th Cir. 1983); *Parts & Elec. Motors, Inc.* v. *Sterling Elec.*,

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[11] Both the district court (Pet. App. 35B) and the court of appeals (*id.* at 8A) treated this key fact as undisputed, and it should therefore be taken as established for present purposes. Whether the ISOs could have shown a genuine issue of material fact as to Kodak market power in some relevant equipment market had they chosen to dispute the point rather than treat it as irrelevant is not before the Court.

Inc., 866 F.2d 228, 236 (7th Cir. 1988) (Posner, J., dissenting), cert. denied, 493 U.S. 847 (1989).

A manufacturer such as Kodak rationally regards revenues from the sale of parts and service for its equipment as ultimately attributable to sale of the equipment. Unless the equipment is sold, there will be no revenues from selling parts and service for it. Even if some prospective buyers do not fully evaluate the total cost of the equipment in choosing among equipment sellers, the manufacturer will take anticipated parts and service revenues into account in determining the equipment sales price. If equipment markets are competitive, then the greater the anticipated profits from parts and service, the lower the price a rational manufacturer will charge for equipment. In effect, manufacturers competing to sell equipment are also competing for the right to sell parts and service over the life of the equipment, and they can be expected to set prices so as to achieve a competitive return on the *package* of equipment, parts, and service.[12] To focus on prices in after-

[12] Firms selling complementary products—equipment and service, or razors and blades—often sell one product, the base product, at a low price, even at a loss, in the hope of profiting from the resulting increased sales of a complementary product. See, *e.g.*, A. Oxenfeldt, *Industrial Pricing and Marketing Practices* 378 (1951); M. Porter, *Competitive Advantage* 436-437 (1985). If buyers in general are sensitive to the total cost of the complementary products, this pricing strategy is likely to profit the manufacturer only if buyers find it beneficial. See note 16, *infra*. If buyers do not find it beneficial, they will turn to sellers in competitive markets for the base product who use different pricing strategies. Competition in the sale of the complementary product (*e.g.*, blades) from those who do not sell the base product (*e.g.*, razors) may make it impossible for a manufacturter to follow this pricing strategy since, facing competition in both markets, the manufacturer would be unable to trade off profits on one product for profits on the other. See A. Oxenfeldt, *supra*, at 379.

markets while ignoring pricing in the equipment market risks finding market power where there is none.

This is not just a matter of economic theory, for there are striking examples of pricing by sellers in light of profits to follow later. For instance, stenographic reporters sell transcription services under contract to administrative agencies but derive considerable revenue from selling copies to other parties. In 1989, the Federal Energy Regulatory Commission ("FERC") solicited bids for a stenographic services contract, expecting that the bidders would offer to provide the service at no charge to FERC because of the anticipated revenues from selling copies. *Ace-Federal Reporters, Inc.* v. *FERC*, 734 F. Supp. 20, 21 (D.D.C. 1990). Ace-Federal more than fulfilled FERC's expectations by first offering *to pay FERC* five cents per page and then offering $1.25 million over the five-year life of the contract for the privilege of providing FERC with this service. *Id.* at 22. Clearly, when pricing an original sale, sellers take into account revenues anticipated to follow from the sale.

The reality that a manufacturer such as Kodak ordinarily cannot exercise market power in aftermarkets if it lacks market power in equipment markets comports with this Court's recognition in other contexts of the importance of interbrand competition. See *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 725 (1988), quoting *Continental T.V.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977) ("so long as interbrand competition existed, that would provide a 'significant check' on any at-

tempt to exploit intrabrand market power"). Thus, Kodak's lack of power in the markets for its equipment renders implausible the ISOs' claim that it has power in aftermarkets for parts and service. In that circumstance, summary judgment should be granted in the absence of evidence showing that Kodak, despite its lack of power in the equipment markets, nevertheless exercises power in the aftermarkets for its equipment.

B. The ISOs Presented Insufficient Evidence Of Market Power In Kodak's Aftermarkets To Create A Triable Issue

1. The court of appeals acknowledged that it had "trouble with the monopoly power (or dangerous probability of monopoly power) issue" raised by the ISOs' Section 2 claims. Pet. App. 18A. "[T]here is logical appeal," the court said, "in Kodak's theory that it could not have monopoly power * * * in the service market since it lacks economic power in the interbrand markets." *Id.* at 19A. But the court nevertheless concluded that the evidence was sufficient to avoid summary judgment since "we cannot say that this theory mirrors reality." *Ibid.*[13]

[13] The court suggested that "market imperfections," although not "pin-pointed" by the ISOs, could "keep economic theories about how consumers will act from mirroring reality." Pet. App. 10A. The ISOs did not point to any specific imperfection in the equipment markets or explain how such an imperfection might result in market power in aftermarkets in this case. Although we cannot demonstrate that market imperfections with such effects are impossible, we are unable to hypothesize plausible market imperfections that would result in market power in aftermarkets but not in the equipment markets. The imperfections would have to be such that Kodak could exploit the purchasers of its equipment by charging supracompetitive prices for parts or service while not losing potential equipment buyers or its present clients when the time came for the purchase of new equipment. See also note 17, *infra*.

The court of appeals concluded that the ISOs "have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market." Pet. App. 10A.[14] In particular, the court referred to "evidence that Kodak charges up to twice as much as [the ISOs] for service that is of lower quality than [the ISOs'] service[,] * * * evidence that in some instances competition from ISOs drove down the price that Kodak was willing to charge for service and that in other instances some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems." *Id.* 10A-11A.[15]

This evidence is insufficient by itself to create a genuine issue of material fact as to whether Kodak has, or has a dangerous probability of achieving, monopoly power in the aftermarkets, given the constraining effect of competition in the interbrand mar-

[14] We are unable to reconcile the court's reliance on a possible finding that Kodak has power in the interbrand markets with the court's acknowledgement that the ISOs "do not dispute Kodak's assertion that it lacks market power in the interbrand markets." Pet. App. 8A n.3. The court apparently did not rely on a distinction between "power" and "market power," because it noted that the ISOs "have not claimed that these factors are sufficient to give Kodak power in its interbrand markets." *Id.* at 12A.

[15] While the court cited this evidence in the context of the ISOs' Section 1 claim, it referred to no additional evidence in connection with the Section 2 claim.

kets on Kodak's ability profitably to charge supercompetitive prices in the aftermarkets. As Judge Wallace explained in dissent, "[a]t best, this would be evidence that Kodak is pursuing a self-destructive pricing strategy which lacks long-term effects upon competition." Pet. App. 23A. It is not evidence of true market power, he continued, because if Kodak prices supracompetitively in the aftermarkets, "competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed." *Ibid.* Indeed, evidence that ISOs would underprice Kodak in the service market if they had access to Kodak's parts may merely reflect a Kodak marketing strategy of spreading over time the total cost to the buyer of Kodak equipment. See note 12, *supra*.[16]

The majority focused on customers who have already purchased Kodak equipment, and who may be "locked in" to Kodak parts until they are ready to replace that equipment. But as Judge Wallace observed, this ignores the important relationship between Kodak's conduct in the aftermarkets and its vital future sales of equipment—sales on which its future parts and service sales depend. Manufacturers competing in equipment markets must take into account the effect of their treatment of previous buyers on future sales of equipment both to those buyers as potential repeat customers and to other potential

[16] A pricing strategy based on lower equipment prices and higher aftermarket prices may benefit buyers in several ways. If the equipment is expensive, the strategy makes it easier for the buyer to finance the initial purchase. Moreover, it may ease the plight of the buyer of equipment that turns out to be unsatisfactory. Nevertheless, a buyer who has benefited from a low equipment price can be expected, after that purchase, to prefer to pay low aftermarket prices as well.

customers.[17] Purchasers, in turn, have an obvious economic incentive to foresee, and protect themselves from, exploitation by the manufacturer. Indeed, the court found it undisputed "that equipment purchasers consider the cost of parts and service when initially deciding between Kodak's equipment and its competitors' equipment." Pet. App. 8A.[18]

Evidence that an equipment manufacturer provided more expensive service than ISOs would not

[17] Economists have constructed models in which firms have an incentive to exploit their locked in customers. See, *e.g.*, Farrell & Shapiro, *Dynamic Competition with Switching Costs*, 19 RAND J. Econ. 123 (1988); Klemperer, *The Competitiveness of Markets with Switching Costs*, 18 RAND J. Econ. 138 (1987). But those models assume the firms have market power with respect to sales of the original product; they also assume two discrete time periods, after which no further sales occur. If Kodak had market power in equipment markets, or if it left the equipment markets while continuing to sell parts and service, those models might be relevant here, but the case would be very different from the one actually before the Court.

[18] Relying on a law review article, the ISOs suggest that purchasers might have difficulty discovering restrictions in the aftermarkets or in estimating perfectly the cost of parts and service over the life of the equipment. Br. in Opp. 14-15. The record in this case, however, gives no reason to think that equipment buyers were taken by surprise here: Kodak faced "little competition" from ISOs until the early 1980s (*id.* at 2), there is no evidence that Kodak changed its long-standing policy with respect to copier parts, Kodak continues to sell parts for pre-1985 micrographic equipment to ISOs, and for new micrographic equipment Kodak's policies are spelled out in its sales contracts (*id.* at 3). In any event, as we explain above, even if buyers do not accurately forecast parts and service prices, manufacturers facing competitive equipment markets have an incentive to price their equipment taking into account the likely sales of parts and service to be generated by sales of the equipment.

establish manufacturer market power over replacement parts for its own equipment when it lacks market power in the equipment market itself. Even evidence that Kodak charged more for poorer quality service would be consistent with a marketing strategy of spreading the cost of equipment more evenly over its life by charging a lower initial purchase price and higher service fees. Whatever Kodak's particular strategy, the fact remains that it cannot set service or parts prices without regard to the impact on the market for equipment, in which it lacks market power.[19]

In sum, the evidence the ISOs presented is "as consistent with permissible competition" (*Matsushita*, 475 U.S. at 588) as with the unlawful exercise of market power. Hence, that evidence is plainly insufficient to overcome the inherent implausibility in the ISOs' monopolization claim, and the court of appeals accordingly erred by holding the evidence adequate to avoid summary judgment on the Section 2 claim.

2. The result should be no different if the ISOs' claims are analyzed as a tying arrangement under Section 1 of the Sherman Act. Relying on this Court's decision in *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2 (1984), the court of appeals held that Kodak could be found to have unlawfully tied service to parts, under the per se rule, if it "is able to force or to induce some potential tying-product customers (here potential Kodak parts customers) to purchase the tied product (here Kodak service) that

[19] This is so even if all, rather than just "many," Kodak parts "are unique and available only from Kodak" (Pet. App. 11A), since the implausibility of the exercise of power in the parts market depends on competition in the interbrand equipment markets, not on multiple sources of replacement parts.

these customers would not purchase absent the tying arrangement." Pet. App. 7A. The court then overturned the grant of summary judgment based on evidence that some customers were induced to purchase Kodak service because they were "locked in" to Kodak equipment by the cost of switching to a different brand of equipment. *Id.* at 7A-8A, 10A-11A.[20]

The court of appeals seriously misread this Court's opinion in *Hyde*. In that case, the Court held that East Jefferson Hospital's policy of requiring surgical patients to use the services of anesthesiologists with whom the hospital had an exclusive contractual arrangement was not a per se unlawful tie. In reaching that conclusion, the Court proceeded from a well-established premise: "not every refusal to sell two products separately can be said to restrain competition." 466 U.S. at 11. Indeed, the Court noted that "[b]uyers often find package sales attractive; a seller's decision to offer such packages can be merely an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act." *Id.* at 12. For this reason, "tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis." *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85, 104 n.26 (1984). Per se condemnation of a tie-

[20] That many Kodak parts may be "unique and available only from Kodak," Pet. App. 7A, adds nothing to the "lock in" analysis. Customers need Kodak parts only because they need to repair Kodak equipment. If switching from Kodak equipment to other equipment were costless, the availability of Kodak parts would matter not at all. Thus, the cost of switching alone, not the limited availability of parts, induced some Kodak customers to purchase service from Kodak rather than from ISOs.

in is appropriate only where "anticompetitive forcing is likely." *Hyde*, 466 U.S. at 16.[21]

In *Hyde*, this Court held that anticompetitive forcing is not likely unless a "seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market." *Hyde*, 466 U.S. at 13-14. Anticompetitive "forcing" does not exist simply because some purchasers of a tied sale would prefer to purchase the tying product separately. *Id.* at 25. Rather, only if consumers are "forced * * * *as a result of the* [*seller's*] *market power* would the arrangement have anticompetitive consequences." *Ibid.* (emphasis added). In this case, the court of appeals effectively read the market power requirement out of *Hyde*.

The First Circuit, in contrast, has recognized that "the 'market power' hurdle" to per se liability for tying is at least high enough that "it cannot ordinarily be surmounted simply by pointing to the fact of the tie itself or to a handful of objecting customers." *Grappone, Inc.*, 858 F.2d at 796 (per Breyer, J.). Furthermore, in *Hyde* the Hospital's 30% market share did not demonstrate a "dominant market position" and provided an insufficient basis for inferring the requisite market power. 466 U.S. at 27. Kodak's market share is well under 30%. The court of appeals thus erred in holding that sufficient market power for a per se tying violation could be shown merely by an effect on "some potential tying-product customers." Pet App. 7A.

Moreover, in *Hyde* the Court assessed market power with reference to the time patients selected East Jefferson Hospital, not the subsequent time when, having chosen East Jefferson, they were being wheeled into the operating room. 466 U.S. at 26-28. The court of appeals therefore compounded its error by relying solely on "locked in" customers who had already purchased Kodak's equipment. A focus on those who have already purchased Kodak equipment, contrary to *Hyde*, ignores the real constraint on the manufacturer's exercise of market power in parts markets that results from competition in the equipment markets.[22]

Under the court of appeals' decision in this case, an equipment manufacturer's efforts to compete against other equipment manufacturers by devising an equipment/parts/service package that it hopes

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[21] *Hyde* makes clear that tying arrangements are but an alternative use of market power that could otherwise be used to "enhanc[e] the price of the tying product." *Id.* at 14. While the Court some years earlier said that per se unlawful tying does not depend on "monopoly power" (*United States Steel Corp.* v. *Fortner Enter.*, 429 U.S. 610, 620 (1977)), even then it made clear that market power over price is required. *Id.* at 620 n.13. Per se unlawful tying, then, appears to require substantial market power, power akin to monoply power and quite close to monopoly power in degree. See *Grappone*, 858 F.2d at 796-797 (the power to raise prices only with respect to buyers with unusual or special needs for a seller's product is insufficient to pass the *Hyde* market power screen; virtually every seller of a branded product has that much market power, and to condemn ties based on that power alone would condemn harmless, and even useful, ties).

[22] In *Digidyne Corp.* v. *Data General Corp.*, 734 F.2d 1336 (1984), cert. denied, 473 U.S. 908 (1985), the Ninth Circuit found that a "lock in" effect enhanced the defendant's market power, a less extreme position than the court of appeals took in this case. Nevertheless, Justices White and Blackmun, dissenting from the denial of certiorari, questioned "whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase." 473 U.S. at 909.

will appeal to buyers may be found unlawful by a jury. But under this Court's decision in *Hyde*, where a manufacturer lacks effective market power in the equipment markets, the tie of parts to service should not be held to so plainly "lack * * * any redeeming virtue" that it is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use." *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958).[23]

As is the case with respect to their monopolization claim, the ISOs have failed to present sufficient evidence to show that their tying claim is plausible. To the contrary, this Court's decision in *Hyde* shows that the evidence the ISOs have presented is entirely inadequate to mount the hurdle presented by Kodak's admitted lack of market power in the equipment markets. On the record before the court of appeals, Kodak's decision to tie service of its equipment to the sale of parts is entirely consistent with the conclusion that Kodak has implemented a permissible marketing strategy. Accordingly, under *Matsushita* the court of appeals should not have reversed the grant of summary judgment on the Section 1 claim.

* * * * *

As *Matsushita* recognized, "antitrust law limits the range of permissible inferences from ambiguous evidence." 475 U.S. at 588. And, as that decision further recognizes, summary judgment plays a critical role in preventing unsoundly based antitrust claims

[23] Proper resolution of the market power issues in this case makes resolution of the business justification issues unnecessary. Pet. App. 18A, 25A. If Kodak lacks the requisite market power over parts (see note 21, *supra*), it does not need to present a business justification for its conduct to obtain summary judgment.

from converting the antitrust laws into a weapon against permissible competitive behavior. "Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also * * * the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979); see also II P. Areeda and D. Turner, *Antitrust Law* 57-58 (1978). It is a hard, litigation-provoking fact that procompetitive and anticompetitive behavior may have similar objectives and similar consequences for competing firms; indeed, those legally polar extremes in market behavior may actually appear "indistinguishable" when "judged from a distance." *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. at 762. Hence, too easy resort to the antitrust laws by "losers" in the marketplace carries with it the daunting prospect of protracted litigation that may well deter procompetitive conduct. *Id.* at 763-764. That is precisely the danger that requires rejection of the unsound "theory" of antitrust liability urged here by the respondents and adopted by the court of appeals.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the
Supreme Court of the United States

OCTOBER TERM, 1991

EASTMAN KODAK COMPANY,
PETITIONER,
v.
IMAGE TECHNICAL SERVICES, INC., *et al.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief Amicus Curiae of National Electrical Manufacturers Association in Support of the Petitioner

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Brief Amicus Curiae of National Electrical Manufacturers Association in Support of the Petitioner

INTEREST OF AMICUS CURIAE

National Electrical Manufacturers Association ("NEMA") is this country's largest trade association for manufacturers of electrical equipment. NEMA's 630 member companies manufacture end-use equipment or components for the generation, transmission, control and use of electricity. NEMA's principal activities involve the development of domestic and interna-

tional standards, statistical and market programs, government relations and international trade.[1]

NEMA members are affiliated with one or more of the organization's divisions and sections. For example, NEMA members affiliated with its Diagnostic Imaging and Therapy Systems Division are engaged in the manufacture of complex, high-technology medical equipment such as computed tomography, magnetic resonance imaging, ultrasound, radiation therapy and nuclear medicine systems. NEMA members affiliated with its Industrial Control and Systems Section are engaged in the manufacture of electrical and electronic industrial control equipment such as industrial computers, programmable controllers and numerical control devices. NEMA members compete vigorously with respect to product quality and performance, and they spend substantial resources on research and development of systems and equipment, computer software, product upgrades and replacement parts. NEMA members compete in intense national and international interbrand markets for the manufacture, sale and service of their products.

NEMA is submitting this brief *amicus curiae* because the Court of Appeals erred in holding that Eastman Kodak Company ("Kodak") could have sufficient market power to support Sherman Act liability for tying under Section 1 or for monopolization or attempted monopolization under Section 2 when it is undisputed that Kodak lacks market power in the interbrand market for photocopier and micrographic equipment. The reasoning employed by the Court of Appeals implies that virtually every vertically integrated equipment manufacturer might be alleged to have market, or even monopoly, power in putative *single brand* after-markets of service or parts sales for its own equipment notwithstanding the absence of interbrand market power.

[1] This brief is filed pursuant to Rule 37 of the Rules of the Court, accompanied by the written consents of all parties.

NEMA believes that this case raises an important question of antitrust law and that the Court would benefit from the perspective of manufacturers that compete in national and international interbrand markets. A number of NEMA members either are at present, or have been in the past, involved in litigation raising the question which is dispositive of this case.

SUMMARY OF ARGUMENT

There are two critical, undisputed facts in this case, and these facts mandate a finding that Kodak could not possess market power in any putative after-market for parts or service. These facts are: (i) that Kodak does not have market power in the interbrand market for photocopier and micrographic equipment (Pet. App. 8A); and (ii) that customers consider the costs of subsequent service and parts[2] when making their initial decision to purchase such equipment (Pet. App. 8A, 20A). In light of these two undisputed facts, it follows inescapably that, if Kodak were to charge supercompetitive prices for parts or service, equipment purchasers would regard Kodak equipment as more expensive and would tend to buy the equipment offered by Kodak's interbrand rivals. If Kodak attempted to force an existing Kodak equipment owner to pay supercompetitive prices for parts or service, interbrand market forces (through the loss of market share which Kodak would suffer in the sale of new equipment) would force Kodak to reinstate

[2] Parts for products such as Kodak's copier and micrographic equipment and other complex, high-technology systems often include not only replacement parts identical to original components but also new features, software and even entire system upgrades (hardware and software) designed to provide an existing user with technology which is virtually identical to the product received by a current equipment purchaser.

competitive prices. Kodak simply cannot possess the market power necessary to support antitrust liability for its unilateral conduct in the putative after-markets, and the antitrust laws are not intended to proscribe unilateral conduct which is necessarily deterred and disciplined by market forces.[3]

---

[3] NEMA is addressing at length only the question of whether the Court of Appeals erred in ruling that Kodak could possess market power in putative after-markets when it did not possess interbrand market power. This issue is sharply focused by the undisputed facts, highly important as a matter of antitrust law and dispositive of the case.

Nonetheless, the Court of Appeals seriously erred in a number of other respects as well. For example:

(i) The Court of Appeals ruled that "market imperfections" could contribute to market power in putative after-markets. (Pet. App. 10A.) The court erred because there was no record evidence, analysis or explanation of what these mysterious "market imperfections" were or of how they could have resulted in Kodak's having market power.

(ii) The Court of Appeals held that "[s]ome strength in the interbrand market, although short of actual market power, can combine with other factors to yield power in an after-market." (Pet. App. 12A.) The court erred because there is no legal significance to "strength" which falls short of "market power." The standard articulated by the court would leave a jury without principled guidelines and should therefore be rejected.

(iii) The Court of Appeals ruled that an integrated manufacturer may not package sales of equipment, parts or service because "it is a less restrictive alternative for Kodak to structure its prices for equipment, parts and service so that the price for which Kodak sells each of these reflects Kodak's investment costs in that area." (Pet. App. 14A.) The court erred because its ruling rests on a fallacious premise that an integrated manufacturer's "investment costs" in equipment, parts and service are distinct and separable.

(iv) The Court of Appeals ruled that *Aspen Skiing Co.* v. *Aspen Highland Skiing Corp.*, 472 U.S. 585, 605-08 (1985), requires a manufacturer to sell replacement parts to any purchaser if the manufacturer is without a "legitimate business justification" for refusal. (Pet. App. 16A.) The court erred because its application of *Aspen* improperly extends that precedent beyond the unusual circumstances of what was in economic substance a monopolist's termination of a joint venture with predatory intent. *Aspen* is only applicable if rivals are unable to duplicate the refused product. *See, e.g., Olympia Equipment Leasing Co.* v. *Western Union Telegraph Co.*, 802 F.2d 217, 219 (7th Cir. 1986). The Court of Appeals' improper reading of *Aspen* would eviscerate the longstanding principle that even a monopolist may unilaterally decline to deal with another party. *See, e.g., United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919); Turner, *Anticipating Antitrust's Centennial: The Durability, Relevance, and Future of American Antitrust Policy*, 75 Calif. L. Rev. 797, 810 (1987).

ARGUMENT

I. The Court Of Appeals Erred In Holding That Kodak Could Have Sufficient Market Power To Support Liability In Putative Single Brand Parts Or Service After-Markets When Kodak Lacks Market Power In The Interbrand Market

— In order to prevail in a Section 1 tying case or a Section 2 case, plaintiff must establish that defendant possesses economic power. Market power requisite to Section 1 tying liability is the power to raise prices or to require purchasers to accept burdensome terms. *U.S. Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977); *see also Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2, 13-14 (1984). Monopoly power necessary to sustain a Section 2 claim is the power to control prices or exclude competition. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). Monopoly power, of course, is something greater than market power. *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co. of America*, 885 F.2d 683, 696 n.22 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 441 (1990); *see generally* L. Sullivan, *Antitrust* § 22, at 75 (1977).

The Court of Appeals' holding that Kodak could possess market power in putative after-markets for parts or service should be reversed because the Court of Appeals' reasoning defies sound economic theory, is inconsistent with precedent and undercuts the antitrust laws' central objective of promoting interbrand competition. In his dissent (Pet. App. 19A-25A), Judge Wallace correctly observed that market forces necessarily prevent a manufacturer which lacks interbrand market power from possessing market power in putative single brand after-markets for service or parts. If Kodak attempted to raise its prices for service or parts to supercompetitive levels, or to

coerce customer action through tying service to parts, it would lose interbrand market share. Unless Kodak were to pursue a course of deliberate self-destruction, any truly anticompetitive conduct would be corrected by the market, and would in fact be deterred. The antitrust laws are not concerned with unilateral conduct which is necessarily checked by market discipline.[4]

Purchasers of complex, high-technology equipment such as Kodak office equipment seek out and consider, at the point of initial equipment purchase, information regarding quality and price of service and parts. These buyers make original equipment purchase decisions based on life cycle costs — that is, the costs of purchasing, maintaining and operating the equipment through its projected useful life. Consequently, vertically integrated manufacturers of such equipment compete fiercely with other manufacturers in the interbrand market with respect to the price and quality of service and parts as well as the price and quality of original equipment. Indeed, many manufacturers offer, and their customers often seek, extended parts and service warranties at the time of sale of the original equipment.

Due to competition in the interbrand market and the attentiveness of buyers to manufacturers' parts and service practices, purchasers of complex, high-technology equipment would respond to any manufacturer's anticompetitive parts or service practices. First, potential purchasers would alter their evaluation of the relative attractiveness of such a manufacturer's equipment. Second, present equipment owners adversely affected by a manufacturer's after-market conduct would alter their consideration of future equipment purchasing. Third, most manufacturers of complex, high-technology equipment offer more than one type of product to their customers. Consequently, a manufacturer's anticompetitive practice in one product market would also lead to loss of goodwill in other product markets.

[4]For example, market power sufficient to support antitrust liability is not established when low entry barriers and the presence of potential entrants would eventually discipline any present market participant that might attempt to charge supercompetitive prices. *See, e.g., United States* v. *Syufy Enterprises*, 903 F.2d 659, 664 (9th Cir. 1990); *see also Parts & Electric Motors, Inc.* v. *Sterling Electric, Inc.*, 866 F.2d 228, 236 (7th Cir. 1988), *cert. denied*, 110 S.Ct. 141 (1989) (Posner, J., dissenting) ("Even if Sterling had played this game, the result would have been a brief perturbation in competitive conditions — not the sort of thing the antitrust laws do or should worry about.").

The Court of Appeals' holding is inconsistent with past reasoning of the Court. Although the Court has not had the occasion, until now, to hold that a manufacturer that lacks interbrand market power cannot possess market power in a putative after-market for its own parts or service, the Court has recognized the competitive discipline which the interbrand market imposes on the pricing and distribution of a manufacturer's service or replacement parts. For example, in other contexts the Court has recognized the close interplay between the sale and the servicing of equipment and also the impact that the availability and quality of service can have on the original sale of a manufacturer's product. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977). Likewise, the Court has recognized that the existence of interbrand competition provides a significant check on any attempt to exploit intrabrand competition. *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 725 (1988); *see also Continental T.V.*, 433 U.S. at 51 n.17.

Lower courts have, in a similar vein, concluded that a vertically integrated equipment manufacturer which charges supercompetitive prices for parts or service, and thereby increases the life cycle costs of its equipment to noncompetitive levels, will lose interbrand market share. *See, e.g., General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 972 (9th Cir. 1983); *Nobel Scientific Industries, Inc.* v. *Beckman Instruments, Inc.*, 670 F. Supp. 1313, 1323 (D. Md. 1986), *aff'd*, 831 F.2d 537 (4th Cir. 1987), *cert. denied*, 487 U.S. 1226, *reh'g denied*, 487 U.S. 1263 (1988).

The Court of Appeals' holding is also at odds with the Court's past observation that the "power" which a manufacturer has over its own brand-name or trademarked product is not power which creates an illegal monopoly when there are substitutes available. *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956). The power held by the manufacturer of a trademarked product derives from the product's reputation for quality, reliability and the like. That power is the natural and procompetitive consequence of product differentiation due to excellence. Such product differentiation is, of course, a hallmark of interbrand competition. To turn product differentiation in the interbrand market into market power in a putative single brand after-market, as the Court of Appeals has done, simply perverts *du Pont*'s teaching.

Indeed, the Court of Appeals' decision is inconsistent with the principal purpose of the antitrust laws — to protect interbrand competition. *Business Electronics*, 485 U.S. at 726. The Court of Appeals' decision not only misapplies antitrust law to parts and service practices of a vertically integrated manufacturer competing in an interbrand market; it also impairs the ability of the manufacturer to compete effectively in that market. The result reached by the court below would place the protection of individual competitors in a putative single product, intrabrand after-market above the fostering of vigorous competition in the interbrand market. The decision thus conflicts not only with the antitrust laws' purpose to protect interbrand competition; it similarly conflicts with the objective of protecting competition rather than individual competitors. *See, e.g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

The "lock-in" theory relied on by the Court of Appeals as a possible source of market power reflects a gross misapplication of economic theory and antitrust law. The lock-in theory improperly focuses inquiry on customer choices at a point after

the sale of equipment instead of at the point of sale. Purchasers of complex, high-technology equipment are knowledgeable. They are often repeat customers for the same or related products; they communicate among themselves; they frequently retain consultants and review professional literature; and they listen to the comparative advertising arguments of both interbrand rivals and limited purpose competitors such as independent service organizations. These purchasers take into account parts and service prices and practices before they buy equipment. The lock-in theory simply has no legitimate application to purchasers of Kodak equipment.

Similarly, the Court of Appeals' reliance on the claimed uniqueness of Kodak parts as a possible source of market power is misplaced. The only meaningful test to determine whether a manufacturer possesses market power is whether it can raise prices profitably, exclude competition or require purchasers to accept burdensome terms. *Fortner Enterprises*, 429 U.S. at 620 n.13. While product uniqueness may in certain circumstances contribute to a manufacturer's market power, it does not establish the market power requisite to antitrust liability. *Jefferson Parish*, 466 U.S. at 37 n.7 (O'Connor, J., concurring). Because interbrand competition prevents Kodak from charging supercompetitive prices or coercing customers' service decisions, it is irrelevant that Kodak parts may be unique. Leading commentators thus have criticized those few courts which have held that the uniqueness of brand name replacement parts can form the basis of market power. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 525, at 529-30 (1990).

Finally, for the same reason that a manufacturer of complex, high-technology equipment lacking interbrand market power cannot possess market power in a putative after-market for service or parts, in reality there can be no separate market for service or parts of a *single brand* of equipment. The def-

inition of a market must take into account the market participants' ability to raise prices or limit output and the extent to which substitutes put constraints on such ability. *Du Pont*, 351 U.S. at 394-400. An integrated manufacturer which raises parts or service prices to supercompetitive levels or which coerces customers' service decisions will lose its interbrand market share. Because the availability of interbrand substitutes thus precludes a manufacturer's ability to act independently of constraining consequences in the interbrand market, there simply can be no separate parts or service market for its *single brand* of product.

Following this reasoning, many lower courts have dismissed Section 2 claims against vertically integrated equipment manufacturers on the ground that there can be no separate market for the service and repair solely of their own products. *See, e.g., Nobel Scientific Industries*, 670 F. Supp. at 1322-23; P. Areeda & H. Hovenkamp, *Antitrust Laws* ¶ 525, at 530 (citing cases).

The absence of a product market for Kodak parts or for service of Kodak equipment that is distinct from the interbrand equipment market also dooms the tying claim under Section 1. As the Court confirmed in *Jefferson Parish*, 466 U.S. at 21, "a tying arrangement cannot exist unless two separate product markets have been linked." As Justice O'Connor, writing for four Justices, also concluded:

> For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product*. When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together.

Id. at 39 (emphasis in original) (citations omitted). Here, the threshold prerequisite for a tying claim — the existence of two separate product markets — is not satisfied. The provision of Kodak parts and service cannot be viewed in isolation from the sale of Kodak equipment. Interbrand competition reveals the artificiality of the effort to separate markets for original equipment, parts and service of a single brand. After considering the costs of equipment, parts and service together, customers purchase Kodak parts and service only because they elect to purchase Kodak equipment. Parts and service, thus, are inseparable from the original equipment purchase. There is no such thing as a single brand, or intrabrand, parts or service market.

II. The Court Of Appeals' Decision Will Impede Procompetitive Business Practices And Effective Interbrand Competition

The Court of Appeals' decision will compel equipment manufacturers either to sell parts to purchasers such as independent service organizations or to incur the costs and risks of treble-damage lawsuits. The decision will limit the flexibility of manufacturers to devise parts and services strategies to meet the demands of a competitive marketplace, and the impairment of that flexibility will undermine interbrand competition. The decision will also weaken interbrand competition by depriving manufacturers of the ability to control the quality of their own products.

Manufacturers of complex, high-technology equipment compete by virtue of quality as well as price. Quality is determined by the design and manufacture of the product, the design and installation of parts and the servicing of the equipment. Improper installation of parts or low quality servicing can

affect the performance of the entire integrated system. In order to ensure the quality of their products, accordingly, manufacturers may choose to control parts installation and service.[5]

An equipment manufacturer may also elect to restrict the sale of parts to third parties in order to preclude the "finger-pointing" which is likely to result when the manufacturer loses control over parts and service. Because the purchaser cannot independently distinguish poor service or improper parts installation from malfunctioning of the original equipment or its parts, the purchaser generally holds the manufacturer responsible for equipment or parts failures. Indeed, an independent service organization has a virtually irresistible temptation to blame the manufacturer for every product performance problem, including problems caused by the service organization's own improper installation of parts or its flawed servicing of the system. Finger-pointing thus detracts from the equipment manufacturer's ability to compete on the basis of quality, because it denies the manufacturer the certainty that its investment in the quality of its equipment and parts will be reflected in the performance of its product. Finger-pointing also inherently impairs the ability of the marketplace to properly reward, and also punish, manufacturers for what is done by them rather than for what is done by someone else.

Lost control over the distribution of parts and service can also discourage manufacturer offerings of warranties and of reduced prices for parts. Because improper installation and service of parts can affect performance, an equipment manufacturer may reasonably fear that exposure under parts warranties or through product liability claims will increase if it must sell

[5]Of course, a manufacturer may also wish to permit, or even encourage, customers' use of independent service organizations. The point is that the manufacturer should be afforded the flexibility to decide how best to respond to its customers' needs and the conditions prevailing in the interbrand market.

to independent service organizations that it does not control. The consequence is an undermining of the manufacturer's incentive to offer warranty protections.[6]

The purpose of the antitrust laws is to protect competition in order to promote product innovation, improvement in quality, increase in output and reduction in total costs. *See, e.g., National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 695 (1978). The decision of the Court of Appeals improperly frustrates that purpose by restricting the flexibility of, and undermining the rewards available to, equipment manufacturers that compete in the interbrand market on the basis of the quality of their equipment or on the basis of the warranty protections offered to their customers.

[6]Even assuming that a manufacturer may have market power with respect to sale of its parts, the economic efficiencies and justifications which are often associated with refusals to sell parts demonstrate that the time is ripe for the Court to abandon the per se rule in tying cases. *See Jefferson Parish*, 466 U.S. at 40-41 (O'Connor, J., concurring).

CONCLUSION

The judgment of the Court of Appeals should be reversed and the summary judgment entered by the District Court should be reinstated.

Respectfully submitted,

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OCTOBER TERM, 1991

EASTMAN KODAK COMPANY,
Petitioner,

v.

IMAGE TECHNICAL SERVICE, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

With consent of the parties, the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") and the Association of International Automobile Manufacturers, Inc. ("AIAM") submit this brief *amicus curiae*. The brief will argue for reversal of the decision below because of the serious adverse consequences of a holding that a manufacturer without market power over the goods it sells can have market power over the replacement parts for those goods. This brief endorses,

but will not simply repeat or summarize, the discussion of this issue contained in the *Brief for the United States as Amicus Curiae* (May 22, 1991) and the *Petition for Writ of Certiorari* (December 20, 1990). The brief will rather focus on the disastrous consequences of any such rule for the members of MVMA and AIAM, and for the ultimate purchasers of the automobiles they manufacture.

THE INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

From time to time, both MVMA and AIAM participate as *amicus* in litigation that raises issues of substantial importance to their members.

MVMA is a trade association of United States Motor Vehicle Manufacturers. Its members are Chrysler Corporation, Ford Motor Company, General Motors Corporation, Honda of America Mfg., Inc., Navistar International Transportation Corp., PACCAR, INC. and Volvo North America Corporation.

AIAM is a trade association of manufacturers, manufacturer authorized importers, and distributors of motor vehicles manufactured for sale in the United States, whose members and associate members include American Honda Motor Co., Inc., American Suzuki Motor Corporation, BMW of North America, Inc., Daihatsu Motor Co., Ltd., Fiat Auto U.S.A., Inc., Hyundai Motor America, Isuzu Motors America, Inc., Jaguar Cars Inc., Mazda Motor of America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Peugeot Motors of America, Inc., Porsche Cars North America, Inc., Rolls-Royce Motor Cars, Inc., Rover Group USA, Inc., Saab Cars USA, Inc., Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., Volkswagen of America, Inc., Volvo North America Corporation and Yugo America, Inc.

This Court may take notice of some undisputed and widely reported facts about the motor vehicle industry

in the United States. The industry is intensely competitive. The three largest American manufacturers (General Motors, Ford and Chrysler), which once accounted for over 90% of new passenger car sales, now have a sales share of only 65%—primarily because of increased competition from foreign car manufacturers. Price competition is so keen that not one of the three largest American manufacturers reportedly makes any profit on its vehicle operations in North America today. In these circumstances, no single U.S. manufacturer realistically could be said to have market power.

All automobile manufacturers in the U.S. (and elsewhere) produce highly complex machines that each contain approximately 13,000 different parts. Each manufacturer produces a variety of different models, and a substantial percentage of the parts in any vehicle are unique to the particular manufacturer or model. Few parts in a Ford Taurus, for example, are common to a Ford Thunderbird, and a far smaller number could be used in a Chevrolet.

Each manufacturer, of course, must supply replacements for virtually all the parts in every single different model. There is little replacement demand for many of these parts, they may be unprofitable even for the auto manufacturer to stock and distribute, and therefore there is very little incentive for other parts suppliers to carry them. These other suppliers naturally want to focus on the replacement parts with the largest turnover for the products of large volume producers.

As a result of these natural market forces, all auto manufacturers will inevitably have a very large share of replacement parts sales for their own vehicles. Indeed, the smaller the sales of a particular vehicle, the higher the manufacturers' parts share is likely to be because not many suppliers will be motivated to compete for such a low-volume demand. If a large "market share" in re-

placement parts for particuar automobiles were evidence of market power or monopoly, then the MVMA and AIAM member companies apparently have such power in many different markets. And, paradoxically, the apparent power may be greatest for the companies which sell the fewest vehicles.

Any company which arguably possesses power in some "market" faces serious litigation risks in the everyday operation of its business, even though the asserted power is wholly illusory. The company is particularly vulnerable to claims that it has monopolized, attempted to monopolize, or imposed tying requirements. Under threat of litigation, the company may be compelled to adopt policies that are inefficient and that will ultimately cause competitive harm. For these reasons, MVMA and its members are seriously concerned about the market test sanctioned by the Ninth Circuit's majority decision in this case.

ARGUMENT

I. THE MARKET DEFINITION ADOPTED BY THE COURT BELOW IS UNREALISTIC AND LEADS TO PERVERSE RESULTS.

A. There Is No Separate Economic Market for Replacement Parts.

The purchasers of automobiles and trucks, like the purchasers of Kodak copiers, know that replacement parts and service will be required from time to time, and they take this into account when they make their purchase decisions. The trend toward increasingly expansive warranty coverage for new vehicles provides one vivid demonstration that the costs of ongoing maintenance and repair are an important element in the competitive struggle for new-vehicle sales.

It is also noteworthy that the U.S. Bureau of Labor Statistics recognizes repair services as an inherent part of a vehicle's content. When the Bureau calculates the

value of quality improvements (or reductions) for its producer and consumer price indices, it gives weight to an improvement (or reduction) in consumer warranties just as it would to a change in any other component part.

Moreover, vehicle manufacturers cannot treat parts and service as separate "markets," which they may enter or exit at will. In order to sell new vehicles (and in some cases to comply with the law), manufacturers have to make available a large inventory of spare parts and provide ready access to service operations nationwide—even though a freestanding enterprise would not find it economical to provide this broad coverage.

It is unrealistic to suppose that automobile manufacturers could exercise any hypothetical market power by raising the prices of replacement parts or service; if they tried to do so, many consumers would perceive it as an increase in the price of new vehicles and the manufacturers would lose sales. The competitive pressures on automobile manufacturers are thus similar to those faced by Kodak.[1] These competitive realities have been concisely described in the dissenting opinion below,[2] and in the briefs already filed by Petitioner and the Department of Justice; this brief will not replow the same ground.

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[1] It is likely that the average vehicle buyer is not as sophisticated about maintenance costs as the average buyer of Kodak equipment, but this only affects the speed with which sales will be lost, not the basic trend.

[2] The following passage in the dissent is also applicable to the vehicle industry:

> Kodak may either price parts competitively and maintain its interbrand market share, or it may price parts supercompetitively—yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. [Pet. App. 23A]

One point, however, should be re-emphasized. The Ninth Circuit majority refused to apply economic logic and common sense because it believed that some unspecified "market imperfections" could "keep economic theories about how consumers will act from mirroring reality." (Pet. App. 10A) The suggestion is that courts should be somehow wary of economic theory when considering summary judgment motions. This reluctance is flatly contrary to the approach in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), where this Court applied commonsense economic theory in order to avoid a jury verdict based on unrealistic assumptions.

> . . . if the factual context renders [plaintiff's] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence than would otherwise be necessary. [475 U.S. at 587].

Indeed, it is necessary to apply some economic theory or model in virtually any antitrust case in order to arrive at a rational result. Private antitrust cases, inevitably, are brought by plaintiffs who claim damage from some economic activity. But plaintiffs can be harmed by activity that is pro-competitive as well as by activity that is anticompetitive, and it is difficult to distinguish between the two without some economic theory about how the competitive system is supposed to work. The impact on the competitive process of particular conduct—like a merger, a resale restriction or an aggressive price reduction—can rarely be determined in any antitrust case without consideration of economic theory. In fact, the *per se* condemnation of tying arrangements that is invoked by the opinion below (Pet. App. 4A), implicitly rests on the global economic assumption that these arrangements are almost invariably harmful to competition. The court below did not reject theory out of a preference for facts; what it did was reject a sound theory in favor of one that increasingly is recognized as unsound. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 32 (1984) (concurring opinion).

It does not make economic sense to find "market power" based on sales shares for replacement parts and services, and the majority opinion below should not have closed its eyes to the economic reality that the opinion itself recognized: namely, the fact that "equipment purchasers would turn to one of Kodak's competitors' if Kodak tied supracompetitively priced parts or service directly to equipment." (Pet. App. 9A)

Courts have repeatedly held that it is wrong to define a single manufacturer's brand as a separate market. *See United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 393 (1956):

> Thus one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.

See also, e.g., International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 908 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1783 (1990) ("a manufacturer cannot be charged with antitrust violations if it monopolizes its own brand"). Moreover, if a manufacturer has no market power over its end product, it cannot "monopolize the market for each unique component that goes into the product." *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 975 (9th Cir. 1983); *accord Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 799 (1st Cir. 1988) (no significant anticompetitive effect from restraint in "Subaru part" replacement market).

It is true, of course, that once consumers have purchased a vehicle of a particular brand, their options for parts replacement or service may be relatively more limited. But, as pointed out by the dissenting judge below in the analogous case:

> If some Kodak owners are unwilling to scrap their copiers and buy new ones from other manufacturers, Kodak will gain short-run profits from the sale of parts. However, as new buyers switch brands, Kodak will lose market share in the sales of new copiers, to its long-term disadvantage. [Pet. App. 21A].

In fact, since the sales of replacement parts and service are ultimately dependent on sales of new products, any attempt to exploit "locked-in" buyers would eventually redue sales of parts and service as well.

This Court actually addressed this issue in the comparable circumstances presented by the *Jefferson Parish* case. People who have already purchased a particular vehicle are analogous to surgical patients who have already checked into a particular hospital. The choices of these patients presumably were materially constrained by an exclusive contract that the hospital had with anesthesiologists. In *Jefferson Parish*, however, this Court appropriately analyzed the arrangement from the standpoint of patients who had *not yet* decided on a hospital:

> Only if patients are forced to purchase Roux's services as a result of the hospital's market power would the arrangement have anticompetitive consequences. If no forcing is present, patients are free to enter a competing hospital and to use another anesthesiologist instead of Roux. [466 U.S. at 25].

The market power test applied by the Ninth Circuit majority is not sanctioned either by prior authority or by economic rationality. This brief will now provide specific illustrations of the perverse effect that this test would have in antitrust litigation involving the automobile industry.

B. Claims Based on a Refusal to Deal.

A competitive business enterprise normally has the freedom to select its own customers. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). The immediate customers of vehicle manufacturers are their franchised dealers, and these manufacturers take extraordinary care in the selection of dealers and ongoing supervision of their performance. This Court has recognized that there are "legitimate reason(s) for a manufacturer's desire to exert control over the manner in which his products are sold and serviced." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 n. 23 (1977). It is no coincidence that the members of MVMA and AIAM, like other manufacturers of complex equipment with ongoing service requirements, tend to have selective distribution systems.

There is, however, a body of antitrust authority which holds that a producer with "monopoly power" or one with access to an "essential facility" does not have the same freedom to select its customers. *E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). If a manufacturer's inevitably high "market share" in the sale of its own replacement parts is taken as an indication of monopoly power, then manufacturers may be subject to antitrust claims whenever they attempt to limit the distribution of replacement parts.

There are a number of legitimate reasons for a manufacturer's refusal to sell replacement parts to all comers. The most obvious is the added administrative cost of dealing directly with large numbers of relatively small customers, but there are other considerations that are particularly important to manufacturers of complex consumer products.

If vehicle service and repair are performed incompetently, for example, consumers will assign some of the

blame to the manufacturer. It is frequently hard for consumers to distinguish between the effects of incompetent repair and incompetent manufacture, and even if repair can be pinpointed as the problem consumers may think that the manufacturers should have exercised greater supervision over repair outlets. Ongoing supervision of independent service facilities may be totally impractical and/or prohibitively expensive, however, and therefore the only practical way to address a serious potential threat to a manufacturer's goodwill may be to limit initially the distribution of replacement parts. This does provide some limited measure of quality control even though dealers may resell the parts to others, and the manufacture's goodwill is less implicated in the performance of "non-franchised" repair shops.

Manufacturers may also have a perfectly legitimate incentive to protect the profitability of their dealers who sell the vehicles themselves and who must be able to fulfill a broad spectrum of service responsibilities. These dealers are required to stock a full complement of parts, the slow-moving and the fast-moving. They have to invest in expensive facilities to maintain this extensive parts inventory, as well as to perform repairs that are out of the ordinary. Unaffiliated service facilities, which do not have corresponding obligations, may therefore have an oportunity to undercut the competitive postition of franchised dealers by concentrating on the most lucrative aftermarket opportunities and "free riding" or "skimming the cream." The *Sylvania* opinion recognized, in analogous circumstances, that a manufacturer may legitimately take actions to protect its dealers from competition of this kind.

It is not a sufficient answer to say that a manufacturer, accused of exploiting a "monopoly" over its own replacement parts, can always prove a business justification for its refusal to sell to a particular antitrust plaintiff. Antitrust litigation is incredibly time-consuming and expen-

sive,[3] and the burden of proof in a rule-of-reason case is particularly important. It is wrong to impose these burdens on a hard-pressed industry, to the ultimate detriment of consumers, as a result of artificial market tests that do not reflect economic reality.

C. Claims of Attempted Monopolization.

The members of MVMA and AIAM do not insist on the use of their own replacement parts for all aftermarket services. They do, however, require their dealers to stock a supply of their own "genuine" parts and generally to use such parts when making warranty repairs (which the manufacturers themselves pay for). Moreover, since a great many substandard parts of all kinds are offered for sale in this country, the vehicle manufacturers believe it is imperative that dealers be cautioned against the use of substandard parts.

Here again, the concept that a manufacturer can exert monopoly power over the sale of its own replacement parts could make it potentially hazardous for a manufacturer to take these prudent steps to protect its own goodwill and guard against the installation of unsatisfactory (and perhaps unsafe) parts in its vehicles on the road. A manufacturer with an already high "market share" for replacement parts may be vulnerable to claims of attempted monopolization if it takes competitive action that will maintain or increase that market share. A specific intent to monopolize may be more readily inferred and, of course, the "dangerous probability" of success

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[3] *In re General Motors Corp.*, 99 F.T.C. 464 (1982) involved, *inter alia*, a claim that GM had a monopoly over the manufacture of so-called "crash parts," like doors and fenders that are likely to be damaged in accidents, and that therefore GM should make these parts directly available to independent body shops. The company ultimately prevailed on business justification grounds, but the case was litigated for over six years and cost millions to defend and to prosecute.

could easily be demonstrated. *See Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

Predatory pricing claims will similarly be facilitated. As mentioned above, a vehicle manufacturer must supply replacements for each of the thousands of parts in its vehicles, even though it is very expensive to do so. For many of the parts there may be no competition at all (at least until a bank of used parts becomes available), and a manufacturer's competitive price responses may therefore be selective and targeted rather than across the board. If shares of replacement-part sales are viewed in isolation, the high shares of vehicle manufacturers make them vulnerable to predatory-pricing claims. And these claims would be hard to defend with one of the standard cost/price tests because the costs of any particular replacement part may be extraordinarily difficult to calculate.

A vehicle manufacturer that has the burden of producing and distributing a full range of parts may well have to price below the fully allocated cost of some parts in order to meet the competition of an outside parts supplier that does not undertake the burden of supplying the full range. Alternatively, if the manufacturer elects to set prices for the fastest-moving parts above those of the competition, it will steadily lose sales of these parts. Moreover, under the perverse logic of the opinion below, the existence of some sales at a "premium" price would provide further evidence of monopoly power in the market for parts.[4] There is something seriously wrong with a market test that poses these kinds of impossible choices.

D. Tying Claims.

In the instant case, a particular set of facts was pleaded alternatively under Section 1 of the Sherman Act (tying agreements) and Section 2 of the Sherman Act (monopo-

[4] The majority below relied on evidence that in some cases Kodak charged more for service than the plaintiffs did. (Pet. App. 10A-11A).

lization). The common factor in each count was the claim that "market power" or "monopoly" was demonstrated by a high sales share in replacement parts. It was then easy to argue that the defendant attempted to extend its "market power" over replacement parts (the tying product) into the market for service (the tied product).[5] The same market-share statistics would support an argument that the defendant had a "monopoly" of its replacement parts, and therefore was not free to select its own customers.

Similar theories are available in actions against MVMA and AIAM members. Consider a claim that a standard new-vehicle warranty ties vehicles, parts and service together. If it is claimed that vehicles are the tying product, a plaintiff would find it hard to prove the requisite market power—and in any event, the instant decision does not directly affect the result. But this decision could encourage plaintiffs to claim that parts are the tying product. The argument would be that customers who want the replacement parts to which they are entitled under warranty have to take the dealer warranty service as well.

Alternatively, it could be argued that the only way to get some replacement parts from manufacturers (an area where they assertedly have "market power") is to get a franchise to sell vehicles, and in this case vehicles would be the tied product. Ridiculous as it may seem, an analogous theory was upheld in the *Sterling Electric* case.[6]

These arguments intuitively seem artificial, but potential plaintiffs will be encouraged to advance artificial tying theories, irrespective of economic reality, so long as

[5] The plaintiff apparently made the alternative claim that Kodak attempted to tie parts to service, which seemed only to add to the court's confusion. (See Pet. App. 5A).

[6] *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 141 (1989).

courts continue to characterize tying arrangements as *per se* offenses. There is substantial support for a revision of that view, as demonstrated by the split opinion in *Jefferson Parish*. This controversy is beyond the scope of this brief, but it can be said that if tying arrangements continue to be deemed *per se* illegal an intelligent application of market-power tests is the most promising way to screen out spurious antitrust claims. Alternatively, if this Court were to decide that tie-in cases should be judged under the rule of reason, an intelligent application of market tests would also be necessary to arrive at sensible results.

CONCLUSION

For these reasons, the members of MVMA and AIAM are seriously concerned about the majority opinion of the Ninth Circuit, and urge this Court to reverse it.

These members obviously do not claim that they should be absolved from the burdens of antitrust litigation. But if antitrust litigation is grounded in theories that bear no relation to economic reality, then there is no conceivable public benefit to justify those burdens—and consumers ultimately will pay the price.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1029

EASTMAN KODAK COMPANY,
Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF DIGITAL EQUIPMENT CORPORATION, ELSCINT, INC., GENERAL ELECTRIC COMPANY, HEWLETT-PACKARD COMPANY, INTECOM INC., PRIME COMPUTER, INC., UNISYS CORPORATION, AND WANG LABORATORIES INC. IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amici participate in the computer, telecommunications and medical equipment industries. Each sells products designed to meet users' needs and offers support (including post-sale service) for those products.[1]

The industries in which amici compete are characterized by stiff competition for system and equipment saies. Most amici are relatively small factors in their indus-

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[1] This brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

tries, and some are in declining positions. Firms in these industries cannot take advantage of users by lowering the quality or raising the price of any feature of their offerings, including replacement parts and service; any firm attempting to do so would quickly lose equipment sales and, indeed, place its entire equipment business at risk. Users and society have greatly benefited from intense interbrand systems competition in these and other high technology industries. *See generally* Brief *Amicus Curiae* of the Computer and Business Equip. Mfrs. Ass'n at 7-11 (Aug. 1, 1991) ("CBEMA Br.").

Users of computer, telecommunications and medical equipment and systems are highly sophisticated. They often make large purchases, and their purchase decisions are made only after careful, informed consideration. While the initial purchase price and the functionality of the system are relevant to their purchase decisions, so too is the total cost of ownership of the system over its entire life, a consideration implicating both the price and quality of post-sale service. Independent publications compare the total cost of ownership and the reliability of competing systems in these industries.

In light of this intense interbrand competition for system sales, numerous precedents reject attempts to label one or another participant in these industries as a "monopolist" in or as having "market power" over a "market" limited to its own offerings (or some part of them). Under these precedents, a firm's lack of market or monopoly power in the interbrand market in which it competes precludes both (a) replacement parts or service for its brand of equipment from being a relevant antitrust market and (b) a finding that it has market or monopoly power in any such alleged after-market. Numerous other precedents give vertically integrated manufacturers, large and small, the flexibility to make business decisions aimed at enhancing their overall interbrand competitiveness even though such decisions may injure intraband rivals. Under these precedents, even a monopolist has no duty to permit intrabrand rivals to free-ride on its investment in resources aimed at maximizing user satisfaction with its systems.[2]

The court below failed to apply these controlling precedents. The result, if allowed to stand, would permit a jury to find that petitioner Eastman Kodak Company ("Kodak") or any other integrated firm, including the smallest and weakest interbrand competitor, possesses market or even monopoly power over providing parts for and servicing its own brand of equipment, even while plainly lacking such power in the interbrand systems market. Such a result makes no economic or antitrust sense. This misapplication of sound market definition and market and monopoly power principles would materially impair competition by restraining the freedom of equipment vendors to innovate with regard to service and other product development efforts so as to enhance their overall interbrand competitiveness. Similarly, the decision below erroneously extends a manufacturer's duty to deal with intrabrand rivals to unprecedented limits, thereby chilling manufacturers from engaging in vigorous interbrand competition.[3]

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[2] Despite these precedents, several amici are now involved in litigation involving issues whether there is a relevant market limited to the service of a particular amicus' equipment, whether that amicus has market or monopoly power in such an alleged market, and whether that amicus' unilateral conduct (typically declining to cooperate in some way with other firms that service the amicus' systems) constitutes monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, or unlawful tying under Section 1 of that Act, 15 U.S.C. § 1. *See* CBEMA Br. at 24-27. This case involves the same issues.

[3] While amici are concerned primarily with the legal and policy issues of general importance that this case presents, we note that the record in this case (as we understand it) is similar in many respects to the records or allegations in other pending cases involving one or another amicus. *See* Pet. App. at 42E-43E. Accordingly, while this brief focuses on the issues of general importance, it will also address the factual record of this case to the extent it bears on other cases.

In short, the effect of the decision below will be to discourage innovation and competition. To avoid this anticompetitive result, we urge the Court to reverse.

SUMMARY OF ARGUMENT

Kodak's conduct raises no legitimate antitrust concern. Respondents, 18 independent service organizations ("ISOs") that service Kodak photocopiers and micrographic equipment, contend that Kodak's policy not to sell replacement parts to ISOs' customers is an unlawful tying arrangement under Section 1 of the Sherman Act, and that its policy not to sell replacement parts to ISOs constitutes actual or attempted monopolization of an alleged market for service of Kodak equipment under Section 2 of that Act. However, respondents have never disputed, and the court below acknowledged, that Kodak lacks market or monopoly power in the interbrand markets for photocopier and micrographic equipment (i.e., systems) sales. This undisputed fact is fatal to respondents' case because it precludes the existence of a triable issue whether Kodak has market or monopoly power in any properly defined market.

A. The court below erred in defining the relevant markets. It held that the relevant market for the Section 2 claim could be limited to service for Kodak equipment. However, most courts, relying on this Court's decision in *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956)—which held that the relevant market must include all reasonably interchangeable substitutes for defendant's offering and thus all constraints on defendant's conduct—have rejected market definitions limited to one manufacturer's product or to service therefor. These courts have recognized that interbrand systems competition gives consumers reasonably interchangeable substitutes.

Similarly, for purposes of the tying claim, the holding below that Kodak replacement parts and service can be

deemed separate product markets, distinct from each other and from Kodak equipment itself, is erroneous because there is no demand for such parts or service except for use in conjunction with the equipment. No consumer would ever purchase Kodak parts or service unless it had already purchased Kodak equipment. There can be no relevant markets limited to replacement parts or service for one manufacturer's systems, and such parts and service cannot be considered two separate product markets for purposes of tying analysis.

B. Kodak's undisputed lack of interbrand market power over systems also precludes it from exercising market power (the power to coerce customers) or monopoly power (the power to raise prices or exclude competition) in the alleged parts and service after-markets. Any attempt to do so would be self-destructive, since the resulting price increase would cost Kodak far more in lost systems sales to prospective new users and to existing users replacing or adding to their existing equipment than it could hope to gain in increased parts or service revenues.

The court below recognized this logic but nevertheless reversed summary judgment for Kodak on the ground that there might be some unspecified "market imperfections" insulating Kodak's parts and service practices from the forces of interbrand competition. That approach disregards this Court's settled standards for granting summary judgment in antitrust cases, particularly as specified in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The effect of the decision below would be to eliminate summary judgment in tying and monopolization cases: any antitrust plaintiff will claim that there might be some unspecified "market imperfection" necessitating a trial. This Court has made clear that summary judgment is required unless there is significant probative evidence in the record that raises a genuine issue of material fact for trial. The speculation of the court below about what market imperfections

might exist outside the record plainly fails to meet that standard.

The court's observations that Kodak once charged more than ISOs for service, that some Kodak equipment owners will pay such higher prices rather than switch to competitors' equipment, and that Kodak parts are unique also fail to raise a triable issue:

1. That Kodak once charged more than ISOs does not mean it could sustain those prices long enough to permit an inference of market power. Interbrand systems competition precludes a manufacturer from exercising market power over replacement parts or service for any economically meaningful length of time. Buyers generally are willing to pay more for brand-name products than for generic substitutes, but that fact alone cannot give brand-name vendors market power in any sense relevant to antitrust concerns.

2. That some Kodak owners would accept higher service prices rather than switch to competitive equipment is also irrelevant. Buyers take steps to avoid exploitation when they purchase equipment and sellers have no rational incentive to risk losing future equipment sales by raising service prices to existing users. The proper point at which to measure the seller's market power is before, not after, the user has made its equipment purchase decision.

3. The alleged uniqueness of Kodak parts does not give Kodak any advantage over interbrand competitors, and therefore also cannot support an inference of market power.

C. Finally, the court below incorrectly held that Kodak has a legal duty to provide parts to ISOs unless it proffers justifications that a trier of fact finds to be "genuine" rather than "pretextual." This holding dramatically expands the circumstances under which an alleged monopolist may or should be forced to assist its

competitors. It is particularly anomalous in light of respondents' admissions and claims that, despite Kodak's allegedly restrictive parts practices, (a) the number of ISOs and the volume of their businesses have grown dramatically over the past 10 years; (b) many ISOs maintain inventories of Kodak parts substantially greater than Kodak's; and (c) ISOs provide superior service to Kodak. The court's preoccupation with whether Kodak's justifications are "genuine" or "pretextual" and the result of its holding—permitting a jury to find treble-damage liability on this kind of record—threatens to chill wholly legitimate, procompetitive actions. The decision below should be reversed.

ARGUMENT

I. THE COURT BELOW INCORRECTLY HELD THAT THERE COULD BE RELEVANT MARKETS FOR KODAK REPLACEMENT PARTS AND SERVICE OF KODAK EQUIPMENT

The court below held that there were triable issues whether Kodak has market power over a "market" for Kodak-brand replacement parts (for purposes of the Section 1 claim) and monopoly power over a "market" for service of Kodak systems (for purposes of the Section 2 claim). These holdings raise issues of fundamental importance at the heart of numerous cases pending against firms in several high technology industries and directly affecting the ability of *all* firms in these industries to innovate and compete. *See* CBEMA Br. at 24-27. These holdings are incorrect and should be reversed.[4]

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[4] Kodak properly raised the market definition issue in its summary judgment motion. *See* Memorandum . . . in Support of Defendant's Motion for Summary Judgment at 32-34, *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, No. C 87 1686 WWS (N.D. Cal. Aug. 14, 1987).

Market definition and market/monopoly power issues are closely intertwined. Market and monopoly power are economic concepts that are generally proved through surrogate facts, usually market share data. Before determining whether a firm has market or monopoly power, the market in which to make that determination must be *correctly* defined. Antitrust plaintiffs typically urge the narrowest imaginable product market, for the narrower that market, the larger defendant's share thereof. Many plaintiffs go so far as to define the market as defendant's own brand, or even more narrowly and artificially as goods (such as replacement parts) or service associated with that brand. In this manner, defendant would likely have a high "market share" in the purported "relevant market."

This approach does not promote competition. To the contrary, it ingores the choices that are in fact available to consumers. Thus, in *duPont*, the Court stated that control of 75% of the cellophane "market" would have constituted monopoly power *if* the market had been so defined, but held that defendant did not have monopoly power because the correctly defined market consisted of *all* flexible wrapping materials, not merely cellophane. 351 U.S. at 404. The Court added (*id.* at 393):

> [O]ne can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for tht product.

The "competitive market" must take account of all constraints on a firm's ability to raise price or limit output, and specifically must include all reasonably interchangeable substitutes for the products in question and

all suppliers that could readily assign productive capacity if given proper incentive to do so. *Id.* at 389-94. *See also Brown Shoe Co. v. United States*, 370 U.S. 284, 325 (1962); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510-11 (1948). Thus, all firms and products whose presence constrains defendant's behavior must be included in the relevant market.

Following *duPont*, most lower courts have refused to define markets limited to a single manufacturer's products or a single brand, in cases involving the computer, medical equipment and other industries.[5] Similarly, most lower courts have rejected market definitions limited to

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[5] *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 908 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1783 (1990); *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989); *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1538 (8th Cir. 1989); *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 643 (10th Cir. 1987); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986); *Seidenstein v. National Medical Enters., Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984); *Transource Int'l, Inc. v. Trinity Indus., Inc.*, 725 F.2d 274, 282-83 (5th Cir. 1984); *General Business Sys. v. North Am. Philips Corp.*, 699 F.2d 965, 972-75 (9th Cir. 1983); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 244 (6th Cir. 1982); *Parsons v. Ford Motor Co.*, 669 F.2d 308, 312 (5th Cir.), *cert. denied*, 459 U.S. 832 (1982); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117-18 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 242 (5th Cir. 1978); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 919 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *ALW, Inc. v. United Air Lines*, 510 F.2d 52, 56 (9th Cir. 1975); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 296 (7th Cir. 1974); *Allen-Myland, Inc. v. IBM Corp.*, 693 F. Supp. 262, 272-79 (E.D. Pa. 1988); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 985 (N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 429 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

replacement parts or service for one manufacturer's equipment. In *International Logistics Group*, for example, Chrysler cut off plaintiff's access to Chrysler replacement parts because plaintiff had been selling them at prices lower than Chrysler's. The Sixth Circuit rejected plaintiff's claim that this action was an unlawful attempt to monopolize an alleged market for "the resale of Chrysler manufactured replacement automotive parts to Chrysler franchised dealers" because "[m]onopolization of a single brand is not an antitrust violation." 884 F.2d at 905, 908. *See also Dunn & Mavis*, 691 F.2d at 243, 244.[6]

In *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972), the Ninth Circuit affirmed summary judgment against a complaint alleging a relevant market limited to servicing Stenocord equipment because there was no evidence "that Stenocord dominated the market for office dictating machines generally, or that it controlled a major share of the market for machines of its particular type." And in *Spectrofuge Corp. v. Beckman Instrs., Inc.*, 575 F.2d 256, 278-86 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979), the Fifth Circuit rejected a market limited to servicing Beckman scientific instruments because service was an integral part of the market for equipment sales.

These cases correctly reject market definitions limited to one manufacturer's product (or associated goods or services) when interbrand competition prevents the exercise of market power over any alleged intrabrand aftermarkets. Where effective interbrand competition exists, a manufacturer cannot profitably impose any anticompetitive intrabrand restraint over either parts or service. Any attempt to do so would cost the manufacturer far more in lost systems sales than it could hope to gain in

[6] These same principles apply to definition of the tying product market for Section 1 purposes. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-27 (1984); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 796-97 (1st Cir. 1988).

additional parts or service profits. Thus, under the *duPont* framework, interbrand competition provides consumers with reasonable alternatives, and precludes a market definition limited to replacement parts or service for one manufacturer's equipment.

On the Section 1 claim, the court below held that there was a triable issue whether parts and service for Kodak equipment were distinct product markets. Pet. App. at 6A-7A. This holding overlooks the economic reality that demand for Kodak parts and service cannot be separated from demand for Kodak equipment: no consumer would ever purchase Kodak's parts or service if it did not already have Kodak's equipment. Thus, Kodak parts and service are not distinct either from Kodak equipment or from each other and, therefore, a necessary element of the tying offense—two distinct product markets—is not met. *Jefferson Parish*, 466 U.S. at 21 ("a tying arrangement cannot exist unless two separate product markets have been linked"). As Justice O'Connor explained in her concurrence on behalf of four Justices in *Jefferson Parish*, *id.* at 39 (emphasis in original),

> [f]or products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product*. When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together.

This case illustrates the importance of applying that minimum criterion. Because consumers have "no use" for Kodak parts or service except "in conjunction with" Kodak equipment, there is no economically rational basis to define markets for "Kodak parts" or "service for Kodak equipment" separate from the market for Kodak equipment. Since Kodak's conduct thus does not involve two distinct product markets, the concerns underlying

the tying prohibition do not arise. *See id.* at 14-15. There is accordingly no need to inquire into Kodak's power in the alleged parts market or, for that matter, in the equipment market.[7]

On the Section 2 claim, the court below addressed market definition only in passing. It stated simply that "[t]his court has strongly suggested that service of one company's micrographic equipment can be a relevant market under Section 2," relying on *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480-81 n.3 (9th Cir. 1986), *modified*, 810 F.2d 1517 (9th Cir. 1987). Pet. App. at 18A. *Dimidowich* does not support that proposition. The Ninth Circuit there intimated that service of a product and the product itself may be viewed separately *only* for purposes of determining in a Section 1 conspiracy case whether two firms competed with each other and thus whether their alleged concerted refusal to deal was a horizontal or vertical restraint. The court was not called on and did not purport to engage in the market analysis required in tying and monopolization cases.

Respondents cited below only two other cases that they contend support the proposition that the relevant market may be limited to one manufacturer's products: *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978), and *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241 (5th Cir.), *cert. denied*, 474 U.S. 1037 (1985). Neither case supports their position.

[7] Concurring on behalf of four Justices in *Jefferson Parish*, Justice O'Connor persuasively argued that tying claims should be analyzed under the rule of reason rather than being treated as illegal per se. 466 U.S. at 33-42. Indeed, as Justice O'Connor noted, only in "rare" circumstances will tying be "economically harmful." *Id.* at 36-37 & n.4. *See* R. Bork, *The Antitrust Paradox* 365-81 (1978). Since respondents limited their Section 1 claim to an assertion of per se illegal tying, this case presents the Court with an opportunity to consider Justice O'Connor's argument, which amici support, that per se treatment of tying claims is inconsistent with this Court's antitrust jurisprudence.

In *Heatransfer*, the Fifth Circuit upheld a jury finding of a relevant market limited to air conditioners for Volkswagen products. The court deemed it appropriate to separate air conditioners from cars because an air conditioner was not an indispensable component of a car. 553 F.2d at 980. One year later, the Fifth Circuit expressly rejected a market definition limited to servicing Beckman scientific instruments because service *was* an integral part of the equipment. *Spectrofuge*, 575 F.2d at 278-86. In this case (as in the other pending cases involving similar market definition issues), the peculiar facts of *Heatransfer* are not present. Indeed, it is undisputed that replacement parts and service are critical elements of both system performance and the customer's decision which system to buy.

In *C.E. Services*, plaintiff, an ISO, asserted that the market consisted of all ISOs servicing IBM computers. Defendant, another ISO, agreed for purposes of summary judgment that the market should be limited to service of IBM computers, but argued that IBM should also be included in that market. Neither party addressed the impact of interbrand competition on market definition, and the Fifth Circuit did not consider or decide the issue. When the Fifth Circuit has considered that issue, it has held that the existence of interbrand competition forecloses a market definition limited to a single firm's offerings. *See* cases cited *supra* at 9-10 & n.5.[8]

In sum, it makes no antitrust or economic sense to define a market as one competitor's products or as replacement parts or service for those products. To do so improperly "makes every maker of unique parts for its own

[8] In *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712 (7th Cir. 1987), *appeal after remand*, 866 F.2d 228 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 141 (1989), the court, over Judge Posner's dissent, accepted a tying product market limited to parts for defendant's brand of electric motors. But defendant had waived any argument for defining the market at the interbrand level. 826 F.2d at 717-18; 866 F.2d at 230.

product a holder of market power no matter how unimportant its product might be in the market." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 525.1b at 530 (1990 Supp.) ("Areeda & Hovenkamp").

II. THE COURT BELOW INCORRECTLY HELD THAT KODAK COULD HAVE MARKET OR MONOPOLY POWER OVER ITS PARTS AND SERVICE

Respondents have never disputed that Kodak lacks market or monopoly power in the interbrand equipment markets. The court below recognized the "logical appeal" in Kodak's argument that it could not have market or monopoly power in the alleged parts and service after-markets if it lacks such power in the interbrand systems markets. Pet. App. at 8A n.3, 19A.[9] The case should have ended there, for there can be no antitrust violation without interbrand market power.[10]

Nevertheless, the court held that there was a triable issue whether Kodak has market power over parts and monopoly power over service because of the novel premise that "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id.* at 10A. It added that, while respondents had "not

[9] Specifically, the court correctly observed that "competition in the interbrand markets might prevent Kodak from possessing power in the parts market" and that

> just as equipment purchasers would turn to one of Kodak's competitors if Kodak tied supercompetitively priced parts or service directly to equipment, equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts. Kodak's desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service.

Pet. App. at 8A, 9A.

[10] Whatever the distinction between Section 1 market power and Section 2 monopoly power may be, that distinction cannot obscure the fact that some form of economic power is the focus of antitrust law.

conducted a market analysis and pin-pointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality." *Id.*

The court also cited alleged "evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market": (a) Kodak once charged "up to twice as much as [respondents] for service that [was] of lower quality"; (b) competition "drove down the price that Kodak was willing to charge"; (c) "some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems"; (d) Kodak parts "are unique and available only from Kodak"; and (e) Kodak's share of the interbrand equipment markets may approach as much as 23%. Pet. App. at 10A-12A. Such evidence, even if it were to exist,[11] would fail to raise a triable issue.

A. The Existence of Interbrand Competition Precludes the Exercise of Intrabrand Market or Monopoly Power

The decision below that Kodak's undisputed lack of market power in the interbrand equipment markets did not necessarily prevent it from having market power in the alleged parts and service after-markets (Pet. App. at 10A-12A) is wrong. Kodak's lack of interbrand market power precludes it as a matter of sound law and

[11] The sources of the evidence on which the court below relied were the declarations of officials of various respondents, principally the declaration of Paul Hernandez, president of Image Technical Services. We understand that this evidence consists in its entirety of multiple hearsay statements that would not be admissible under Fed. R. Evid. 802-804. Such evidence fails to create a triable issue, because a party opposing summary judgment must "set forth such facts as would be admissible in evidence." Fed. R. Civ. P. 56(e).

economics from possessing such power in any alleged after-market. Any attempt to charge supra-competitive prices in an alleged after-market would be unprofitable because the resulting price increase would cost Kodak far more in lost equipment sales than it could hope to gain in increased parts or service revenues. Thus, lack of interbrand market power precludes any possibility of anticompetitive effect in the hypothetical parts and service after-markets.

In dealer termination and other cases involving intrabrand territorial or customer restrains imposed on dealers, this Court has long recognized that interbrand, not intrabrand, competition is the antitrust law's "primary concern." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724-26 (1988).[12] "[S]o long as interbrand competition existed, that would provide a 'significant check' on any attempt to exploit intrabrand market power." *Business Elecs.*, 485 U.S. at 725 (quoting *Sylvania*, 433 U.S. at 52 n.19). Following *Sylvania*, the lower courts have uniformly required a showing of *interbrand* market power as a prerequisite for liability in such cases. VIII P. Areeda, *Antitrust Law* ¶ 1645 at 480-81 & n.15 (1989). The rationale for this rule was set forth in *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 316 (8th Cir. 1986):

> Firms lacking [interbrand] market power, if they wish to survive, cannot adopt restraints that have anticompetitive effects. Thus such firms cannot have an effect on interbrand competition. Consequently, a finding of no [interbrand] market power precludes any need to further balance the competitive effects of a challenged restraint.

[12] In *Sylvania*, 433 U.S. at 54, the Court held that the rule of reason, not the per se rule, should apply to vertical nonprice restraints because such intrabrand restraints "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."

See also Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982).

This sound approach of focusing on interbrand rather than intrabrand competition should be followed in this and the other pending cases involving similar issues (*see* Pet. App. at 42E-43E). However, under the decision below, interbrand competition will effectively be subordinated to intrabrand competition. That decision makes no economic or antitrust sense and should be reversed.

B. The Reliance of the Court Below on Unspecified "Market Imperfections" Disregards This Court's Settled Law for Granting Summary Judgment in Antitrust Cases

The decision below that unspecified "market imperfections" are sufficient to create a triable issue regarding market and monopoly power would eliminate summary judgment in a large class of antitrust cases. Under the decision below, no tying or monopolization case could be disposed of until inquiry into hypothetical market imperfections—whose breadth would be limited only by the imagination of the parties' economists—had been completed. The result would lead to extremes of speculation neither contemplated by the authors of Fed. R. Civ. P. 56 nor allowed under this Court's decisions.

The court below misapplied controlling standards for granting summary judgment in antitrust cases. Its reliance on unspecified "market imperfections" ignores this Court's holding that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis by the Court). To show such an issue in an antitrust case, a plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts," and "if the factual

context renders [plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matshushita*, 475 U.S. at 586-87. In addition, once the moving party has identified those portions of the record that it believes demonstrate the absence of a triable issue, the non-moving party must then come forward with "specific facts showing there is a genuine issue for trial." *Id.* at 587.

In *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), then-Judge Kennedy elaborated:

> It is the record made on summary judgment that controls, not that record plus speculative inferences a trier of fact might add: and the only inferences permitted from the summary judgment record itself are those that are reasonable given the substantive law which is the foundation for the claim or defense. Where a party asserts there is a genuine issue for trial . . . its argument is measured by the underlying theory of the claim or defense being considered. . . . [T]he substantive law is the law of antitrust, and if the claim makes no economic sense, a speculative inference from the jury will not help it. In such an instance, the record on summary judgment must contain further persuasive evidence if it is to support the claim.

The decision below is contrary to these settled principles. The court expressly recognized the logic that interbrand competition precludes market or monopoly power over parts or service, thus necessarily recognizing the *illogic* of respondents' claim that Kodak has such power. Far from requiring respondents to provide more persuasive or even significant probative evidence to support their claim, however, the court simply speculated that "market imperfections" may be present. It did not identify those "imperfections" or impose on respondents the burden of doing so because, in its view, that would

somehow "elevate theory above reality." Pet. App. at 10A.

But *Matshushita* imposes just such a burden and requires antitrust plaintiffs to present "more persuasive" *evidence* in opposition to a summary judgment motion where, as here, the claim makes no economic sense. More basically, it precludes denial of summary judgment on the basis of speculative inferences such as the unidentified "market imperfections" cited below. Summary judgment is especially important in antitrust cases because "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work," and "the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). Accordingly, the decision below should be reversed.[13]

C. The "Actual Events" Relied on by the Court Below Do Not Create a Triable Issue as to Kodak's Market Power

The alleged evidence of actual events referred to by the court below (*see supra* at 15) fails to create a triable issue.

1. The possibility that Kodak once charged more than ISOs for service could be suggestive of market power only "under proper circumstances." *General Business Sys.*, 699 F.2d at 977.[14] No such circumstance exists

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[13] Respondents' complaint that the district court improperly denied their Fed. R. Civ. P. 56(f) motion for additional discovery prior to ruling on Kodak's summary judgment motion is unfounded. No such additional discovery could have yielded evidence sufficient to create a triable issue where respondents did not dispute Kodak's lack of interbrand market power.

[14] One circumstance that is not only proper but *essential* to any inference of market power is a showing of significant entry barriers. Absent such barriers, the mere fact that Kodak might have been

here. Respondents presented no evidence supporting their assertion that Kodak's higher prices resulted from the existence or exercise of market power.

Evidence that Kodak charged higher service prices at one time does not mean that it could sustain those prices long enough to permit a reasonable inference of market power. *See Syufy*, 903 F.2d at 665-66; *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1320-21 (7th Cir. 1991).[15] The court below found that competition "drove down the price that Kodak was willing to charge for service" (Pet. App. at 11A), thus confirming that Kodak lacks the power to sustain higher prices.[16] The fundamental, dispositive fact here is that interbrand systems competition wholly forecloses Kodak from maintaining higher prices; any attempt to do so would only "hasten[] the date on which [Kodak] surrender[s] to its competitors" in the equipment market. *General Business Sys.*, 699 F.2d at 977. *See also Sylvania*, 433 U.S. at 55 ("[t]he availability and quality

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charging higher prices at some point in time cannot suffice to create a genuine issue as to its market power. *Matsushita*, 475 U.S. at 591 n.15 ("without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time"); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987 (D.C. Cir. 1990) (Thomas, J.) ("[i]n the absence of significant [entry] barriers, a company probably cannot maintain supra-competitive pricing for any length of time"); *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990) ("any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less"). We are unaware of any record evidence of entry barriers allowing Kodak to *maintain* higher prices.

[15] This Court has made clear that market definition and market power issues should be considered in terms of "long run," not "immediate," responses. *United States v. Continental Can Co.*, 378 U.S. 441, 455 (1964).

[16] Contrary to the holding of the court below, this evidence, far from permitting a reasonable inference of Kodak's economic power, shows that Kodak lacks market power.

of [service and repair] affect a manufacturer's goodwill and the competitiveness of his product").

Moreover, evidence that Kodak charged more than ISOs would "be entirely consistent with a marketing strategy of spreading the cost of equipment more evenly over its life by charging a lower initial purchase price and higher service fees." Brief for the United States as Amicus Curiae [in support of the petition for certiorari] at 11 (May 1991). Conduct as consistent with lawful as with unlawful competition does not, standing alone, create a triable issue. *Matsushita*, 475 U.S. at 588. Such evidence would also be entirely consistent with the business reality that many buyers are willing to pay more for brand-name offerings than for generic substitutes. That reality cannot bestow market power where there is effective interbrand competition; if it did, even the smallest and weakest brand-name competitor could thereby incorrectly be deemed to have market power.

2. The court below held that an inference of market power could be supported by "evidence" that some Kodak equipment owners would pay higher service prices rather than switch to competitors' equipment. Pet. App. at 11A. Similarly, respondents have asserted that some existing Kodak equipment owners are "locked in" to replacement parts and service for their equipment and could not readily switch to competing brands of equipment. Both this "evidence" and, more generally, the lock-in notion fail to create a triable issue.

The lock-in notion is untenable as a matter of law. The lower courts have repeatedly and correctly rejected it as a basis for finding market or monopoly power.[17] This Court should now do the same. The only case even arguably supporting the lock-in notion is *Digidyne Corp. v.*

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[17] *General Business Sys.*, 699 F.2d at 975; *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 293-95 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); *Telex*, 510 F.2d at 917; *ILC Peripherals*, 458 F. Supp. at 429.

Data General Corp., 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). There, however, the Ninth Circuit did not find that an alleged lock-in gave defendant market power. It simply observed that lock-in "enhanced" economic power that the court had already found from the existence of a copyright. *Id.* at 1341-43. *Digidyne* has been roundly criticized by other courts of appeals, and the Ninth Circuit itself has declined to apply it.[18]

The lock-in notion is also contrary to sound economics. It ignores the realities that buyers can and do protect themselves from exploitation by the seller and that sellers risk the loss of future equipment sales to both new and existing users if they exploit their allegedly locked-in customers. Thus, the proper point at which to evaluate whether a seller has economic power over the buyer is before, not after, the user has purchased the seller's, rather than someone else's, equipment.

Antitrust law is concerned with the predictable harm that an unrestrained monopolist is likely to cause, not with the kind of harm an irrational firm could cause. Focusing on an existing user's possible vulnerability to increased service prices is pointless unless the seller could increase service prices without destroying its market position. Here, as in the many other pending cases involving the same issue, the manufacturer cannot raise parts or service prices to existing users without jeopardizing far greater future equipment sales. The fear of a lock-in effect is misplaced where the manufacturer lacks market power in the interbrand market.

3. The court below observed that "many Kodak parts . . . are unique and available only from Kodak." Pet. App. at 11A.[19] The alleged "uniqueness" of a manufacturer's parts, however, does not give the manufacturer market or monopoly power.

> A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product. Similarly, a high market share indicates market power only if the market is properly defined to include all reasonable substitutes for the product.

Jefferson Parish, 466 U.S. at 37-38 n.7 (O'Connor, J., concurring). The Court has made clear that a product's uniqueness will not confer market power unless it gives defendant some advantage over its *interbrand* competitors. *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 622 (1977) ("[w]ithout any evidence that the Credit Corp. had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected—the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving").

The uniqueness of a manufacturer's products or parts does not bestow market power if there is effective interbrand competition. Such competition prevents the manufacturer from exploiting the uniqueness of its products in an anticompetitive manner. Where, as here, the fact of

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[18] *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346 n.4 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); *A.I. Root*, 806 F.2d at 677; *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986).

[19] That observation appears incorrect as a factual matter. Respondents admit that "many ISOs have inventories of Kodak parts substantially greater than Kodak's." Brief of Appellant at 15, *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, No. 88-2686 (9th Cir. Oct. 10, 1988) ("Respondents' C.A. Br.").

interbrand competition is undisputed, the uniqueness of a manufacturer's parts cannot give it market power.

4. Finally, given Kodak's undisputed lack of interbrand market power, its percentage share of the interbrand markets—whether 23% or 80%—is irrelevant. Moreover, it is settled that a 30% market share, even combined with evidence of actual market imperfections, is insufficient to support a finding of market (let alone monopoly) power. *Jefferson Parish*, 466 U.S. at 26-27. *See also Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-13 (1953) (33%-40% share insufficient to meet market power requirement of tying offense); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986) (20.4%-28.4% share suggests insufficient market power to engage in predatory pricing).

III. THE COURT BELOW INCORRECTLY HELD THAT KODAK HAS A LEGAL DUTY TO PROVIDE REPLACEMENT PARTS TO ISOs

The court below purported to recognize the rule that a monopolist has no general duty to deal with its competitors.[20] It nonetheless stated that a "monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason" and that "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent

[20] "The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors." *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 116 (1975). Thus, "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor. . . . The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-01 (1985).

legitimate business justifications." Pet. App. at 16A-17A. It then held that (a) there was a triable issue whether Kodak's first two justifications of promoting interbrand competition and reducing inventories (*see* Pet. at 5-6) were "genuine rather than pretextual"; and (b) Kodak's third justification of preventing freeriding by ISOs (*see id.* at 6) was illegitimate as a matter of law. Pet. App. at 17A-18A.

The decision below conflates two entirely separate questions, namely, whether Kodak had a legal duty *ab initio* to cooperate with respondents and whether, assuming it had such a duty, it was nevertheless excused from that duty by virtue of a legitimate business justification. By so confusing the issues, the decision below effectively transforms the rule that a monopolist has no general duty to cooperate with its competitors into a rule that it does have such a duty unless (and only unless) it can prove its business justification.[21]

That is not and cannot be the law. While this Court has never clearly articulated the circumstances under which a firm is legally bound to deal with its rivals, it has surely not held that a firm—even one possessing monopoly power—has a general duty to deal absent a legitimate business justification. If any duty to deal should ever be imposed, it should be exceedingly narrow, and its restricted application should be clearly defined. P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 852-53 (1990). *See also Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). Of dispositive significance

[21] The court below purported to recognize that a Section 2 plaintiff bears the burden of proving lack of business justification. Pet. App. at 17A n.9. But it rejected Kodak's proffered justifications on the basis of speculative inferences, not on the basis of significant probative evidence showing that those justifications did not exist or were not legitimate.

here, "[i]t may be presumed that requiring a vertically integrated monopolist to deal with would-be competitors does not have [a procompetitive] effect." Areeda & Hovenkamp ¶ 736.2a at 762. This is because the alleged monopolist in the vertically integrated after-market (e.g., for parts or service) "is not a monopolist in a realistically defined market" and "does not possess power over market output or price"; therefore, "allowing access to his facilities would not reduce a market power that does not exist." *Id.* ¶ 736.2d at 771.

The court below erred in finding a triable issue whether Kodak's inventory of parts is an "essential facility." While Kodak has for several years followed a policy of not providing replacement parts to ISOs or customers using ISOs, respondents admit that "[t]he number of ISOs and the volume of their business has grown dramatically over the past ten years." Respondents' C.A. Br. at 2. Respondents further admit that "many ISOs have inventories of Kodak parts substantially greater than Kodak's," that 90% of Kodak's parts are not made by Kodak, and that they are able to obtain parts from other sources. *Id.* at 15. And respondents "presented evidence that their service is superior to Kodak service." Pet. App. at 13A. Under these circumstances—all occurring without access by ISOs to Kodak's parts—such access cannot be deemed an essential facility.

The court below further erred in focusing on the intent behind Kodak's parts policies (specifically on whether Kodak's proffered justifications were "genuine" or "pretextual"). Making antitrust liability hinge on such intent evidence would chill perfectly lawful conduct that the antitrust laws are intended to promote. Legitimate, procompetitive business practices are by definition designed to take business away from rivals:

> Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run.

Olympia, 797 F.2d at 379. Thus, "if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Id.*

Using intent as the barometer of anticompetitive conduct wrongly shifts the focus from the actual effects on consumers to a necessarily subjective analysis of defendant's state of mind. But "the nature and consequences of a particular practice are the vital consideration, not the purpose or intent." III P. Areeda & D. Turner, *Antitrust Law* ¶ 626a at 76 (1978). The approach of the court below would deter firms alleged to have market or monopoly power from engaging in legitimate, procompetitive practices by threatening them with treble-damage antitrust liability. *A.A. Poultry Farms, Inc. v. Rose Acres Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1326 (1990).[22]

Finally, the court below erred by holding that Kodak's desire to prevent freeriding by ISOs is illegitimate as a matter of law. *See* Pet. App. at 14A-15A. This Court has often recognized that it is perfectly legitimate and competitively desirable for businesses to take steps to eliminate freeriding. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-63 (1984); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 222 (1980); *Sylvania*, 433 U.S. at 55. *See also Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 930 (4th Cir. 1990); *Olympia*, 797 F.2d at 377. Thus, Kodak's undisputed desire to

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[22] *A.A. Poultry* also explains why these issues should be resolved at the summary judgment stage: "Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation." 881 F.2d at 1402.

prevent freeriding should be sufficient as a matter of law to insulate it from antitrust liability.

In short, even a monopolist (assuming the existence of monopoly power) "has the same right to compete as any other company. Under the antitrust laws, a monopolist is encouraged to compete vigorously with its competitors and to remain responsive to the needs and demands of its customers." *United States Football League v. National Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988) (approving jury instructions). The decision below improperly deters brand-name manufacturers from engaging in vigorous competition by exposing them to second-guessing of their business decisions by juries, and to the attendant possibility of treble-damage liability if a jury does not like those decisions. It should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to reinstate the district court's entry of summary judgment for Kodak.

Respectfully submitted,

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EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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No. 90-1029

In The
Supreme Court of the United States
October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

INTEREST OF PUBLIC CITIZEN

This brief is filed, with the written consent of the parties, on behalf of Public Citizen, a non-profit public interest organization whose membership includes over 100,000 consumers. This case arises under the Sherman Act, 15 U.S.C. §§ 1 *et seq.* (1982), which was designed by Congress specifically to protect consumer welfare. *See NCAA v. Board of Regents*,

468 U.S. 85, 107 (1984). Part of Public Citizen's mission is to ensure that the nation's antitrust laws are enforced for the benefit of consumers. In addition, Public Citizen is interested in this case because, as the lessee of three photocopiers manufactured by petitioner Eastman Kodak Company ("Kodak"), it is directly and adversely affected by Kodak's anti-competitive practices.

This case involves a successful attempt by Kodak, a manufacturer, marketer, and servicer of photocopiers and micrographic equipment, as well as a supplier of the parts for such equipment, to corner the market for Kodak replacement parts and to leverage that situation into a stranglehold on the market for service of Kodak equipment, thereby destroying the businesses of a number of independent service organizations that compete with Kodak in this market. Public Citizen, as a representative of consumers generally, is interested in this case because the ultimate price of Kodak's activities has been, and will continue to be, paid by consumers, especially existing owners of Kodak equipment, who have been forced to obtain parts and service from Kodak at inflated prices. Moreover, consumers of other equipment will be injured if other manufacturers are permitted to mimic Kodak's strategy and extract monopoly rents in the after-markets for their products.

A central issue in this case is Kodak's ability to control the service market by virtue of its power over the market for Kodak replacement parts. This issue in turn hinges on a factual question concerning consumer behavior in the marketplace for photocopiers and micrographics equipment. Due to Public Citizen's expertise on consumer behavior and its position as a consumer of Kodak equipment, it is able to offer a different perspective than that of the respondents.

STATEMENT

This case involves a concerted attempt by Kodak to limit the supply of Kodak replacement parts and, in so doing, to gain control over the market for servicing Kodak equipment. Since there has been no trial in this case, and only limited discovery, all factual doubts must be resolved against Kodak, the party that moved for summary judgment. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Accordingly, this statement sets forth the facts as respondents allege they can be established at trial.

Kodak's illegal activities started in mid-1985, when it embarked on a campaign to take control of the market for Kodak parts and drive independent service organizations ("ISOs") out of the service business for Kodak equipment. Prior to that time, Kodak had an open sales policy for Kodak parts, and did not attempt to prevent ISOs from competing with it in the service market for Kodak equipment. Joint Appendix ("JA") 99; JA 152; JA 349-50; JA 415-16; JA 435.

Kodak utilized a two-step strategy to control the markets for Kodak parts and service. The first step was to cut off ISOs from potential supplies of Kodak parts by effectively making Kodak the sole source of supply for replacement parts. This was accomplished by: (1) agreeing with independent original equipment manufacturers ("OEMs"), which supply Kodak with 90% of parts for Kodak equipment, that the OEMs would not sell any parts that fit Kodak equipment to anyone other than Kodak (JA 428-29; JA 468; JA 496); (2) pressuring Kodak equipment owners not to sell Kodak parts to ISOs (JA 428-29); (3) pressuring independent parts distributors not to sell Kodak parts to ISOs (JA 517-18; Documents lodged with Clerk with the filing of the Joint Appendix ("L") 140; L 143); and (4) effectively closing the used machine market, including as a parts source. JA 423; JA 427-28; JA 510-11; JA 650.

The second step in Kodak's scheme was to utilize its

newly achieved control over Kodak replacement parts to drive ISOs out of the service business. This was accomplished in part by conditioning the sale of parts to its customers on their agreement to refuse to deal with ISOs, thereby effectively "tying" Kodak service to Kodak parts, on which Kodak now held a virtual monopoly. JA 428-29; L 163. Kodak also required ISOs who wanted to buy Kodak parts from Kodak to stop servicing any Kodak equipment other than their own and to stop selling used Kodak machines. L 143; L 159.

By 1987, Kodak had largely succeeded in controlling the supply of Kodak parts and driving many ISOs out of the service business. JA 422; JA 463. Remaining ISOs have suffered the loss of substantial revenues and accounts (JA 458-59; JA 495-96; JA 501-02), and consumers of Kodak equipment have also suffered by being forced to pay higher prices for inferior service. JA 420-22; JA 425-27; JA 474-75; JA 514.

A complaint was filed on April 14, 1987, on behalf of 18 small ISOs that, among other things, repaired, serviced, and sold parts for Kodak equipment ("respondents"). JA 411; JA 449; JA 462; JA 470-71; JA 504. The complaint alleged, *inter alia*, that Kodak violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 *et seq.* (1982), by monopolizing the Kodak parts market, conspiring with others to deny Kodak parts to respondents, monopolizing an aftermarket for Kodak service and reconditioned equipment, and restraining trade through agreements tying the sale of Kodak service to Kodak parts. JA 5-37.

Kodak moved for summary judgment before respondents had even initiated discovery, arguing that the "material facts with respect to the challenged business practices . . . are not seriously disputed." JA 91. Over respondents' objections, the district court permitted only very limited discovery (JA 255-98; JA 315-25), and then, on April 18, 1988, granted Kodak's motion, and dismissed the action.

On appeal, respondents argued that they had raised a

number of triable issues including: (1) whether Kodak's refusal to sell parts to equipment owners, unless they agree not to use ISOs, constitutes a tying arrangement violative of Section 1 of the Sherman Act;[1] and (2) whether Kodak's refusal to sell parts to ISOs, in combination with its other efforts to control the market for Kodak parts and service, is an act of monopolization violative of Section 2 of the Sherman Act. *See Image Technical Serv., Inc. v. Eastman Kodak*, 903 F.2d 612, 614 (9th Cir. 1990).

On May 1, 1990, a divided panel reversed the order of dismissal, finding that triable issues of fact existed with respect to both the Section 1 tying claim and the Section 2 monopolization claim. With respect to the tying claim, the Court rejected Kodak's theory that, since it allegedly does not have market power in the interbrand markets for copier or micrographic equipment, it cannot as a matter of law have sufficient economic power in the parts market to result in an illegal tying arrangement.[2] The Court stated that, whether it is possible for a firm in a competitive basic equipment market to charge supra-competitive prices for equipment parts, is not a question that should be decided "on a theoretical basis." *Id.* at 617. The Court further noted the absence of a fully developed record on the market power issue due to the "very limited discovery" that was permitted by the district court. *Id.* Despite the absence of full discovery, however, the Court stated that respondents *had* presented evidence that Kodak

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[1] Respondents specifically argued that whether the tying arrangement is a *per se* violation of the Sherman Act, or merely an unreasonable restraint of competition under the rule of reason, its legality requires a factual development. JA 746-47.

[2] In order to establish a *per se* illegal tying arrangement, it is necessary to demonstrate sufficient economic power with respect to the tying product (parts) to restrain competition appreciably in the tied product (service). *See Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 499 (1969).

may in fact have used its power in the parts market to leverage an unfair advantage in the service market. *Id.* Such evidence, ruled the Court, is sufficient to raise a material issue of fact as to whether Kodak has sufficient power in the parts market to sustain a tying claim. *Id.* at 618. With respect to the monopolization claim, the Court rejected Kodak's argument that it could not have monopoly power in the service market since it allegedly lacks market power in the interbrand market. *Id.* at 621. As with the tying claim, the Court held that Kodak's theory simply did not "mirror[ ] reality." *Id.*

The dissent disagreed on both counts. As to the tying claim, the dissent wrote that Kodak's "lack of power in the interbrand market *necessarily* precludes power in the derivative market ...." *Id.* at 622 (emphasis in original). The dissent rejected respondents' evidence that Kodak, in fact, does exert power in the aftermarkets for Kodak parts, stating that "[n]o amount of evidence of pricing in the derivative market" can overcome the presumption raised by Kodak's alleged lack of power in the interbrand market. *Id.* Thus, the dissent concluded that respondents had failed to raise any genuine issues of material fact with regard to Kodak's market power in the market for replacement parts. *Id.* at 623. As to the monopolization claim, the dissent wrote that summary judgment was proper because Kodak had demonstrated a legitimate business reason for its behavior. *Id.* at 621.[3]

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[3] In so ruling, the dissent ignored a fundamental tension in Kodak's defense. On the one hand, Kodak claimed that its alleged lack of market power in the interbrand equipment market proved that it could not, as a matter of law, have attempted to monopolize the markets for Kodak parts or service. Under this theory, which Kodak embraces exclusively in this Court, whether Kodak had a legitimate justification for its acts is legally irrelevant. At the same time, however, Kodak strained to excuse

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SUMMARY OF ARGUMENT

Both of respondents' Sherman Act claims hinge on a factual question concerning the extent of Kodak's economic power in the aftermarkets for parts and service. Kodak attempts to transform this fact question into a legal one by arguing that an equipment manufacturer lacking interbrand market power cannot, as a matter of law, wield sufficient power in aftermarkets for parts or service to create either tying or monopolization liability. In this way, Kodak urges the Court to adopt a rule of *per se* competitiveness in aftermarkets for parts and service whenever an absence of market power in the product market is demonstrated.

Kodak's approach should be rejected because it ignores numerous fact questions concerning consumer behavior that bear directly on the market power issue. The central assumption underlying Kodak's theory is that any significant price increases in aftermarkets will inevitably reduce demand for Kodak equipment because the rational consumer necessarily considers the costs of parts and service when choosing among competing equipment sellers. This characterization by an interested manufacturer of the rational consumer, however, fails to recognize that some consumers might not have access to sufficient information about parts and service at the time of equipment purchase, might not be able to use the information they have, or might make purchasing decisions solely based on equipment cost, performance, availability, and the

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its attempt to monopolize the parts and service markets by offering purported justifications for its actions. Since the existence of any justification necessarily involves the factual question of pretext, it would be improper to decide that issue on summary judgment, especially given the limited discovery allowed here.

like, deferring decisions concerning parts and service until the need arises. Moreover, even assuming that price increases in aftermarkets would, as Kodak suggests, reduce demand for Kodak equipment, Kodak might, under some circumstances, still be able to exploit existing, "locked-in" owners of Kodak equipment who have no option other than to purchase Kodak equipment and service at inflated prices. Thus, Kodak might be able to sustain long-term, anti-competitive strategies in parts and service aftermarkets notwithstanding an absence of market power in the interbrand equipment market.

The extent of Kodak's power in the markets for replacement parts and service, then, hinges on a number of fact questions about consumer behavior that cannot be resolved without further development of the record. Kodak's suggestion that this Court should apply a *per se* rule of competitiveness whenever an absence of interbrand market power is demonstrated assumes these critical fact questions out of existence. As this Court has recognized, it is improper to use *per se* rules to create antitrust liability in complex cases such as this one; it is equally improper to preclude antitrust liability when the record presents serious questions about how the market really works.

Given the presence of a genuine factual dispute with respect to the market power issue, the Court of Appeals properly reversed the district court's decision granting summary judgment in Kodak's favor. The only "proof" offered by Kodak on the market power issue concerned its alleged lack of power in the interbrand equipment market. This proof falls far short of the mark, since even if Kodak does lack power in the equipment market (an issue that is itself the subject of dispute), this does not by any means dictate a finding that Kodak lacks power in the parts and service aftermarkets. Thus, Kodak did not even meet its initial burden of demonstrating an absence of disputed facts with respect to the market power issue. Moreover, even if Kodak had met its initial burden under the summary judgment standard, respondents have offered more than sufficient evidence of Kodak's actual power in the parts and service aftermarkets to withstand a motion for summary judgment.

ARGUMENT

THE DECISION REVERSING THE GRANT OF SUMMARY JUDGMENT MUST BE AFFIRMED BECAUSE THE MARKET POWER ISSUE IS A FACT QUESTION THAT CANNOT BE RESOLVED BY APPLICATION OF A *PER SE* RULE OF COMPETITIVENESS.

To establish tying liability under Section 1, it is necessary to demonstrate that "the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984) (citations omitted). To establish monopolization liability under Section 2, it is necessary to demonstrate the "power to control prices or exclude competition" in the relevant market. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956). Thus, determining the extent of Kodak's market power is central to both of respondents' claims.

Kodak's primary argument in this Court is that an equipment manufacturer lacking interbrand market power cannot, as a matter of law, wield sufficient power in aftermarkets for parts or service to create either tying or monopolization liability. *See* Petitioner's Brief on the Merits ("PB") at 16-27. Absent interbrand market power, theorizes Kodak, any attempt to raise prices to noncompetitive levels in aftermarkets for parts or service would simply serve to drive off customers, both old and new. In the long-run, the argument goes, the price of survival in the interbrand market would be the

restoration of competitive prices in aftermarkets. Thus, absence of interbrand market power in equipment markets is said automatically to preclude long-term, supra-competitive pricing and other anti-competitive tactics in aftermarkets for parts and service.

This theory reflects a tidy vision of consumer practices that is not born out by the facts or the law. In effect, Kodak is urging this Court to ignore the factual complexities of consumer behavior and instead apply a rule of *per se* competitiveness in aftermarkets whenever an absence of market power in the product market is demonstrated. However, as this Court has recognized, *per se* rules are a crude and inexact way to dispense with antitrust cases that raise questions about how markets really work. *See, e.g., Federal Trade Comm. v. Indiana Fed. of Dentists*, 476 U.S. 447, 458-59 (1986) (noting the Court's "reluctance to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"); *see also NCAA v. Board of Regents*, 468 U.S. 85, 100-01 (1984). Although Kodak's theory may be an accurate predictor of consumer behavior under some circumstances, the market power issue is fundamentally a fact question that should only be resolved after a full and fair opportunity for discovery and, perhaps, trial.

A. KODAK'S ATTEMPT TO RESOLVE THE MARKET POWER ISSUE BY APPLICATION OF A *PER SE* RULE OF COMPETITIVENESS IGNORES THE COMPLEXITY OF CONSUMER DECISION-MAKING.

1. Kodak Incorrectly Assumes That All Consumers Consider The Costs Of Parts And Service When Selecting Equipment.

Kodak's theory, as outlined above, is based on a number of over-simplified assumptions about consumer behavior. The first concerns the effect of price increases in parts and service markets on potential new purchasers of Kodak equipment. Kodak argues that any significant price increases in aftermarkets will inevitably reduce demand for Kodak equipment because the rational consumer necessarily considers the cost of parts and service when choosing among competing equipment sellers. Put another way, Kodak treats the product purchased by all new consumers as not just the equipment, but a single unbundled unit of present equipment and future parts and service needs.

This approach is wrong, not because it may not accord with reality in some cases, but rather because it assumes a serious factual question out of existence. Notwithstanding Kodak's claims to the contrary, the reality may well be that many consumers do not base their purchasing decisions on the combined cost of equipment, parts, and service.[4]

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[4] For the reasons stated by respondents, the Court of Appeals incorrectly found that respondents do not dispute that equipment purchasers consider the cost of parts and services when deciding on equipment. *See* Respondents' Brief on the Merits ("RB") at Statement of the Case (E). Even if respondents had conceded this

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For example, some customers might not have access to information about the availability and price of parts and service at the time of equipment purchase. Contrary to Kodak's claims, this would make perfect "economic sense" (PB at 29) given the obvious disincentives for equipment sellers (such as Kodak) to make full disclosure of their past repair histories and costs, and the absence of anything resembling a Consumers' Reports on commercial copiers and micrographics equipment and their service costs. Unlike what is available for televisions and dishwashers, independent, dependable projections of the costs of parts and service are not readily available for these products.

Even assuming sufficient access to information about parts and service at the time of equipment purchase, even sophisticated consumers may not be able to make good use of such information due to the difficulty of predicting the type of repairs that might be required, whether the costs will be principally service or parts, and how frequently they should expect major service problems for which there can be substantial differences in the prices of the parts and/or the service.

Still other customers might not even attempt to evaluate the markets for parts and service when making their initial decision to lease or purchase a Kodak machine. For example, a buyer of Kodak equipment that has entered into a maintenance agreement with Kodak for the term of the warranty might not consider the availability of parts or service beyond the initial warranty period. Or a lessee of Kodak equipment, with an option to purchase, might defer consideration of the

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issue, this Court performs its own review of the record and is not constrained by the errors of parties. *See Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 872-73 (1982).

cost of parts and service until the option is ripe -- at which time the sunk costs in the machine might compel a purchase, notwithstanding Kodak's inflated prices for parts and service.

In short, a host of factors suggest that, from the standpoint of the consumer in the market for a photocopier or micrographic equipment, the costs to be considered when making a purchasing decision might not encompass service or parts at the time the equipment purchase decision is made. For such consumers, supra-competitive pricing in aftermarkets for service and parts would not affect the decision whether to purchase equipment from Kodak or from one of its competitors. In this scenario, Kodak could exploit consumers of Kodak parts and service notwithstanding an absence of market power in the equipment market.

Thus, Kodak oversimplifies consumer behavior by assuming that all consumers in the market for Kodak equipment evaluate parts and service costs at the time of equipment purchase. In fact, the actual behavior of consumers under the circumstances presented in this case is a factual question that cannot be resolved on the record before this Court.

2. Kodak's Attempt To Deny The Existence Of "Lock In" Also Assumes Too Much.

The second suspect assumption in Kodak's theory of consumer behavior concerns existing owners of Kodak equipment. As the Court of Appeals noted, the record shows that some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems. 903 F.2d at 617. For these "locked-in" owners, then, Kodak is able to charge monopoly prices for parts and service notwithstanding its alleged lack of power in the interbrand equipment market.

Kodak's argument against the existence of lock-in has a familiar but hollow ring to it. According to Kodak, absent

market power in the market for interbrand equipment, no company could successfully exploit locked-in customers by charging monopoly prices for service and parts. To do so, says Kodak, merely would drive away new and repeat purchasers. *See* PB at 25-26. Kodak goes on to suggest that a lock-in strategy is "impossible" in this case, since Kodak would never make more total profit by overcharging its existing customers than it would lose as equipment sales dry up. *Id.*

This argument again assumes too much. First, as discussed above, it is not at all clear that the cost of service and parts plays a significant role in decisions to purchase new equipment, even among customers that already have Kodak equipment. This is a factual question that cannot be resolved on the present record.

Second, the argument assumes that Kodak must offer service to new and repeat customers on the same terms it charges to existing, locked-in, customers. But Kodak could insulate new or repeat customers from price increases by a variety of strategies, such as offering special maintenance agreements or service contracts that do not reflect the monopoly prices charged to locked-in customers. In this way, Kodak could exploit existing customers without driving off important new business.

Third, the lock-in effect may vary depending on the extent of a consumer's investment in Kodak equipment. For example, the lock-in effect is likely to differ for those who own one copier, that readily can be replaced, and those, like the clients that respondents and other ISOs serve, who own a large number of copiers and for whom switching to a new brand might not be a feasible option. The lock-in effect for bulk consumers undoubtedly is made worse by the fact that any attempt to break the lock by replacing worn-out Kodak copiers with competitors' machines as the need arises would likely result in non-uniformity of brands within a single company, especially for those owners who, like many customers of respondents, own many machines rather than one or two.

Such customers might be locked-in to paying higher prices for service to Kodak because the burden and expense of operating and maintaining different equipment brands prevents them from taking advantage of interbrand competition. Thus, it is quite possible that Kodak could charge monopoly rents to locked-in customers notwithstanding its alleged lack of power in the interbrand market.

The market power issue, then, cannot be resolved absent an inquiry into how these consumers really behave and how these markets really work. The validity of Kodak's theory must be tested by examining, for example, the extent to which its customers consider the availability and cost of parts and service when deciding whether to purchase Kodak equipment, the availability of information to consumers in the market for Kodak equipment, the extent of "lock-in," and the like. These are precisely the sort of fact questions that cannot and should not be resolved by application of *per se* rules. *Cf. United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (conducting extensive factual inquiry to determine relevant market for purposes of analyzing a monopolization claim).

B. KODAK FAILED TO MEET ITS BURDEN OF ESTABLISHING NO GENUINE ISSUE AS TO THE MARKET POWER QUESTION.

The Ninth Circuit properly found that Kodak failed to establish the absence of any genuine issue of fact as to whether Kodak wields sufficient power in the market for Kodak parts to sustain tying and monopolization liability. Kodak claims, erroneously, that it met its burden of proof on this issue by demonstrating Kodak's lack of power in the interbrand equipment market. *See* PB at 27-32. Having done so, says Kodak, the burden shifted to respondents to rebut Kodak's "proof" that it lacks sufficient power in derivative aftermarkets.

This argument fails on several counts. First, Kodak's claim to lack market power in the interbrand equipment market is in fact a hotly contested issue in this case. *See, e.g.*, RB at Statement of the Case (H) (demonstrating that Kodak has substantial market power in at least three of seven interbrand basic equipment markets). Kodak's attempt to assume away this essential fact question should be rejected.

Second, even assuming that Kodak does lack power in the equipment market, this does not dictate a finding that it lacks economic power in the parts market. *See* discussion *supra* at A. Thus, Kodak did not even meet its initial burden of demonstrating an absence of disputed facts with respect to the market power issue. To do so, at the very least Kodak would have to prove that the new equipment market will work as it suggests, *i.e.*, that consumers in the market for copiers and micrographic equipment obtain relevant information about the cost of parts and service and use it during the negotiation for the price of the equipment. Kodak would also have to establish it cannot successfully exploit locked-in customers, *i.e.*, that existing Kodak equipment owners would, if faced with inflated prices in parts and service aftermarkets, switch to other equipment brands.

Since Kodak did not even meet its initial burden on the market power issue, the summary judgment standard enunciated by this Court in *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574 (1986), does not apply in this case. There, the Court held that, when the moving party has carried its burden under Rule 56(c) of the Federal Rules of Civil Procedure, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586 (citations omitted). The Court went on to state that, in an antitrust case, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.* at 588.

Contrary to Kodak's claim, this standard does not apply here because Kodak never met its initial burden of establishing the absence of any genuine issue on the market power question. However, even if Kodak had met its burden with respect to the market power issue, respondents have satisfied the *Matsushita* standard. As the Court of Appeals recognized, respondents cast more than a "metaphysical doubt" as to the facts; the record shows, for example, that Kodak charges up to twice as much as respondents for service that is of lower quality than that provided by respondents. 903 F.2d at 617. This evidence would be sufficient to withstand a motion for summary judgment even under the *Matsushita* standard, since evidence of supra-competitive pricing is certainly not as consistent with permissible competition as with illegal monopolization. By Kodak's own theory, no competitor in its right mind lacking interbrand market power would engage in a strategy as self-defeating as charging monopoly prices in derivative aftermarkets, but that appears to be what happened here. In any event, even if Kodak might be able to demonstrate that its supra-competitive pricing is occurring within the context of a competitive marketplace, the existence of such a market is a genuine fact issue that cannot be resolved by summary judgment at this stage of the litigation.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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BRIEF FOR BELL ATLANTIC BUSINESS SYSTEMS SERVICES, INC., AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus Bell Atlantic Business Systems Services, Inc., is the world's largest independent service organization that provides maintenance, repair, and other service for large, medium-sized, and personal computers, including mainframes, peripherals, and other information processing equipment. Bell Atlantic provides service to the owners of equipment manufactured and sold by IBM, Digital Equipment Corporation (DEC), and other companies. Amicus has been in business for more than 25 years.

Bell Atlantic faces a similar problem in its industry to the problem faced by respondents in theirs. To ensure full service on complex computer equipment—which may

cost millions of dollars and, because of periodic upgrades provided by the manufacturer, have a useful life of more than 10 years—a service provider like Bell Atlantic, or the equipment owners themselves, must have reasonable access to parts, diagnostic software, training materials, and so-called "engineering changes" (or "field change orders") from the manufacturer. Bell Atlantic's servicing business—indeed, the entire independent service business for large and medium-sized computers that has developed over the past several decades—could be seriously threatened, and consumers seriously harmed, if manufacturers were permitted to gain control over service on their equipment by exploiting these needs through exclusionary policies like the Kodak policies at issue in this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

As it comes to this Court, this case involves three distinct markets, or levels of markets: equipment; parts to be used for repairing or upgrading the equipment; and service on the equipment. Respondents are independent service organizations (ISOs) who in the early 1980s developed businesses of servicing Kodak copying and micrographic equipment. During that time, according to their allegations and evidence, they and their customers were able to buy parts from Kodak that were essential to providing full service to owners of Kodak equipment. This suit challenges Kodak's attempt to monopolize the service of its equipment by adopting, in 1986, new policies of (a) tying parts to service, *i.e.*, selling parts to equipment owners only if they buy service from Kodak or perform their own service, and (b) refusing to sell parts to ISOs.

Respondents challenge those policies as violating the Sherman Act, 15 U.S.C. §§ 1, 2—in particular, Section 1's *per se* rule against tying arrangements, and Section

[1] The parties have consented to the filing of this brief. Letters to that effect have been filed with the Clerk of the Court.

2's prohibition of monopolization and attempted monopolization. This case has not been tried, and so the Court must take respondents' evidence and the inferences it would support as given. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Kodak therefore asks this Court to adopt a flat rule, as a matter of law, that the presence of competition in the equipment market precludes market power in the separate parts or service markets—even though Kodak's policies produce higher service prices to consumers. But Kodak has not offered sufficient justification for adoption of its theory as a rule of law. Facts are plainly in dispute, and respondents are entitled to a trial.

A. Under the standards of tying and monopolization liability set forth by this Court, respondents have, for purposes of the present petition, made out the basic elements of their claims. Kodak has used its unique control over key parts to force Kodak equipment owners to buy service from Kodak that they would prefer to buy from ISOs at substantially lower prices—a tying arrangement between the parts and service markets. Moreover, after selling parts to independent service providers for several years, Kodak ceased such sales of its unique parts in an effort to eliminate competition from ISOs and monopolize service. The effect has been to impose higher prices on consumers by eliminating their competitive alternatives. These facts satisfy the standards for liability under *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (tying arrangements), and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (monopolization).

Kodak asks this Court for a new limitation on those standards, suggesting that the Court hold, as a matter of law, that the higher prices to consumers—facially anticompetitive harms—cannot actually be anticompetitive. The reason, Kodak urges, is that any market power in the two "aftermarkets" being tied together by Kodak, the

markets for parts and service, is made impossible by the existence of competition in yet a third market—the market for new equipment. Kodak argues that it is entitled to summary judgment on that theory under *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), but this case is notably different from that. There, the plaintiffs were challenging *low* pricing, which antitrust law promotes, on a speculative economic theory that consumers would ultimately be harmed. In the present case, by contrast, Kodak's conduct results in immediately higher prices to consumers, which antitrust law seeks to prevent, and Kodak is urging adoption of a speculative economic theory to excuse that conduct. Unlike the argument advanced by the plaintiffs in *Matsushita*, moreover, respondents' argument for antitrust liability does make economic sense.

B. Kodak's theory for excusing the elimination of competition rests on a simple factual assertion: that lost equipment sales will *always* outweigh the gains from supercompetitive pricing of parts and service, so that no rational equipment seller would engage in such pricing (and, hence, Kodak's elimination of competition must not, in the end, be truly anticompetitive). But Kodak offers no reason why the balance of gains and losses will always tip decisively against the seller, and this Court cannot merely assume the truth of the factual claim. On the contrary, there are two significant barriers to consumer choice that may substantially undermine the disciplinary effect that competition for equipment sales would otherwise have on pricing in aftermarkets for parts and service.

The first such barrier involves information costs. In order to respond to supercompetitive prices in an aftermarket, a buyer in the equipment market must be aware of those prices and also be able to integrate that knowledge with all of the other complex information about the product that goes into comparative "lifecycle" pricing

(that is, judging price by adding initial cost to projected costs of parts and service over the life of the product). These tasks are often prohibitively expensive to accomplish: the value of the information often does not justify the cost of acquiring it. And in the absence of effective lifecycle pricing, Kodak's theory that equipment competition will prevent exploitation in the aftermarkets collapses.

The second defect in Kodak's economic theory involves the cost of switching to new equipment. Once a consumer invests in a long-life product, there may be little freedom to stop using it even if the consumer is forced to pay supercompetitive prices for parts and service: the option of changing to another product may be too costly. Such high switching costs give sellers in some markets a cushion to use to collect supercompetitive profits.

Kodak's answers to these obvious weaknesses in its fundamental claim are inadequate to justify a flat legal rule that forecloses inquiry into the essential facts. Kodak's principal defense is that there are always some price-sensitive customers that it cannot exploit and, therefore, it "must" and "does" charge competitive lifecycle prices to all of its customers. Kodak Br. 23. But the record does not compel adoption of the critical assumption that price discrimination among customers is not possible. Indeed, Kodak admits that it allows customers to service their own equipment, which necessarily means that it charges different lifecycle prices to some customers. More generally, in markets for long-life, complex products, there are usually many ways in which sellers can discriminate between customers who are fully able to "comparison shop" or switch products and those who are not.

Kodak's other defense rests on various asserted procompetitive justifications for its policy—quality control, inventory reduction, and the avoidance of free riding. But that defense has little to do, as a logical matter, with

Kodak's theory that equipment competition alone is enough to mean that it could not possibly have market power in aftermarkets. In any event, there is a genuine issue of fact as to the validity of the asserted justifications. Indeed, it is difficult to square them at all with Kodak's willingness to allow customers to service their own equipment.

ARGUMENT

As the case comes to this Court, respondents have made out the basic elements of antitrust liability under this Court's precedents on tie-ins and monopolization, showing immediate harm to consumers by the direct and deliberate foreclosure of competition in the service market. Kodak seeks to overcome respondents' case by advancing a new legal rule that purports to explain away the immediate competitive harm as not quite what it seems—as really not the result of market power after all. But that rule rests entirely on a speculative, factual, economic assertion about how much discipline competition in one market (equipment) will actually impose on exploitation of monopoly control in other markets (parts and service). That assertion, far from being obviously and necessarily correct, is clearly open to serious question in various circumstances, including the circumstances presented in this case. There can be no justification for precluding the essential factual inquiry into Kodak's theory by adopting Kodak's proposed rule as a matter of law.

A. Under Established Standards, Respondents Have Raised Triable Issues On The Necessary Elements Of Tying And Monopolization Liability.

There is no real dispute in this Court about the essential elements of either an unlawful tie-in between parts and service or illegal monopolization (or attempted monopolization) of Kodak parts or service.[2] Nor, given the

[2] The law of attempted monopolization is slightly different from the law of monopolization—*e.g.*, monopoly power need be dangerously probable rather than actually present—but such differences are not relevant to the arguments presented by Kodak. If respondents are entitled to a trial on their monopolization claim, they are likewise entitled to a trial on attempted monopolization. We therefore limit our discussion to monopolization.

posture in which this case comes to the Court, can it be seriously denied that respondents have shown enough to go to trial on those elements. Kodak is therefore in the position of seeking to deny liability, without affording respondents a trial, based on a single argument that facially anticompetitive consequences should be excused because, as a matter of law, Kodak *cannot* exercise market power in the parts or service markets.

1. *Legal Standards.* This Court's precedent makes clear the basic elements of an illegal tying arrangement. There must be two distinct products and "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958). Such a tying arrangement is subject to condemnation under the long-standing *per se* rule if it affects a substantial volume of commerce and if the seller can exploit "its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984). *See id.* at 9-10 & nn.13, 14, & 15 (citing cases recognizing the rule and legislative history supporting it in the context of § 3 of the Clayton Act, 15 U.S.C. § 14); *id.* at 16. If "market power" over the tying product (here, parts) is used to force unwanted purchases of the tied product (here, service), the Court's "cases have found the tying arrangement to be unlawful." *Id.* at 14.[3]

[3] Lower courts, including the Ninth Circuit, have held that a tie-in that falls under the *per se* rule may nevertheless be lawful

The basic harm caused by illegal tying arrangements is well recognized: "if [market] power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures." *Jefferson Parish*, 466 U.S. at 14 (footnote omitted, citing sources). *See generally* 9 P. Areeda, *Antitrust Law* ¶¶ 1703-1718, at 32-253 (1991). If a tie-in gives a seller monopoly power over the tied product as well as the tying product, the seller may be able to increase overall monopoly profits above what it is collecting or can collect in the tying-product market. Most directly, "the profits attainable from coordinated monopoly pricing of two goods which, for example, are complements in use, will generally be higher than those realized by setting a monopoly price for each commodity separately."[4] The tie-in may also "facilitat[e] price discrimination, thereby increasing monopoly profits over what they would be absent the tie." *Jefferson Parish*, 466 U.S. at 15 (footnote citing sources omitted).[5] By monopolizing two markets rather than one, moreover, the tying seller may succeed in raising entry barriers in one or the other market, thereby strengthening or extending its market

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"if implemented for a legitimate business reason and if no less restrictive alternative is available." Pet. App. 12A-13A (internal quotation marks omitted); *see Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1349 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988).

[4] F.M. Scherer, *Industrial Market Structure and Economic Performance* 582 (2d ed. 1980) (footnote giving citation omitted); *see* F.M. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 566-67 (3d ed. 1990); Wollenberg, *An Economic Analysis of Tie-In Sales: Re-examining the Leverage Theory*, 39 Stan. L. Rev. 737, 747-50 (1987).

[5] *See also* F.M. Scherer, *supra*, at 582-83; F.M. Scherer & D. Ross, *supra*, at 566-67. Price discrimination is harmful to consumers because it allows the seller to extract more revenue by charging above-market prices to those buyers who will pay such prices while continuing to charge other buyers the market price. *See* Wollenberg, *supra*, at 750-52 (price discrimination gives the seller some of the "consumer surplus").

power in either one alone.[6] In addition, a tie-in may facilitate evasion of a legal restriction applicable only to the tying product, such as the Robinson-Patman Act, 15 U.S.C. § 13, which restricts price discrimination in sales of "commodities" but not service.[7]

With respect to monopolization, the Court has likewise made clear the essential elements of a violation. Two elements must be proved: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), *quoted in Aspen Skiing Co. v. Aspen Highlands Skiing*

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[6] *See Jefferson Parish*, 466 U.S. at 14; *id.* at 36-37 (O'Connor, J., concurring in the judgment); *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 509 (1969). As Judge Breyer explained for the First Circuit in *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 795 (1988), a tying arrangement may allow a seller to "build a strong market position in Product B . . . [that] may increase its power to charge high prices in respect to Product A."

> If a monopolist of patented can-closing machinery, for example, insists, as a condition of selling his machines, that their purchasers buy his cans, he will likely soon have a monopoly in cans as well as machines. And, that fact—the fact that he controls *both* cans and machines—may make his monopoly safer from competitive attack when his patent on the can-closing machinery expires. A new competitor would then have to enter *both* levels of the business (cans and machines) to deprive him of monopoly profits. And, this added security may enable the machinery monopolist to charge higher prices. The tie, by permitting the Seller to extend its market power from one level to two, may thereby raise entry barriers, providing security that helps a monopolist-seller further harm the consumer.

Id. at 795-96.

[7] *See* F.M. Scherer, *supra*, at 583; F.M. Scherer & D. Ross, *supra*, at 567; Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19, 21-23 (1957).

Corp., 472 U.S. 585, 596 n.19 (1985). As to the second element, while this Court has recognized the general right of even a monopolist to refuse to deal with competitors, it has held that the right does not automatically extend to a monopolist's decision to terminate an existing relationship with a competitor where the termination effects "an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Aspen*, 472 U.S. at 603; *see Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951). Rather, such an act may constitute the required "exclusionary conduct" if it is not supported by valid business reasons but, instead, "impair[s] competition in an unnecessarily restrictive way." *Aspen*, 472 U.S. at 605 (footnote omitted, citing 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 626b, at 78 (1978)).

2. *The Facts in This Court.* Because of the posture in which this case is before the Court—prior to any trial, with Kodak seeking to prevail on a simple legal ground—the sufficiency of respondents' proof of the basic elements of both tying and monopolization liability, under the familiar standards, is not truly in dispute here. As to the tying arrangement between parts and service, the existence of two distinct product markets—one for Kodak parts, another for Kodak service—is not at issue: the court of appeals found this to be a factual question (Pet. App. 6A), and Kodak's tying argument proceeds on the assumption that two products are present (Kodak Br. 14-32).[8] *See also* U.S. Br. 4 n.3. Similarly, it is not open

[8] Kodak's brief includes one footnote on the issue (Kodak Br. 15 n.3), but the question has not been properly raised in this Court, and Kodak's passing discussion is wrong for several obvious reasons. To begin with, it ignores the holding of *Jefferson Parish* that whether two products exist must be judged from the consumer's standpoint, based in part on whether the products are in fact sold separately or paid for separately. 466 U.S. at 19-23. Plainly, that test raises a factual question in this case, for there is evidence

to question in this Court that at least some *Kodak* parts are essential to any equipment owner's ability to receive full service: again, Kodak's argument has not rested on challenging respondents' evidence to that effect. *See* Pet. App. 7A ("many Kodak parts are unique and available only from Kodak"); *cf.* U.S. Br. 12 & n.10. To put this last point another way, Kodak effectively has a 100% share of the relevant tying-product market.

There is no dispute that Kodak's "arrangement affects a substantial volume of interstate commerce in the tied product" (service). Pet. App. 4A n.2. More pointedly, respondents have alleged and offered evidence that Kodak's control over the market for the parts necessary to any equipment owner's full-service needs has in fact forced undesired purchases of Kodak service. Again, Kodak's argument in this Court does not rest on any challenge to respondents' claims that consumers switched to Kodak's

that service and parts have been sold separately in the past (Pet. App. 6A; J.A. 99, 152, 349-50, 415-16) and still are sold separately to self-service equipment owners (Kodak Br. 3).

Kodak quotes the test articulated by Justice O'Connor—that "the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product.*" 466 U.S. at 39. But Kodak gets even that test backwards, claiming that "there is no demand for parts other than to provide service." Kodak Br. 15 n.3. The quoted test asks the opposite question: whether some consumers would buy service without parts. The answer to that question plainly is yes, because much service does not require parts. Moreover, even under Kodak's reversed test, Kodak is wrong: some consumers, including respondents, would wish to purchase parts without service.

In any event, the test articulated by Justice O'Connor cannot be applied by asking if consumers *as a whole* would buy the tied product without *ever* having bought the tying product: the test asks if *some* consumers would buy the tied product without *at the same time* buying the tying product. Otherwise, the test would make cameras and film, or cans and can-closing machines, the same products. Yet the real economic harm at which tying law aims is present in such cases. *See* note 6, *supra* (quoting from *Grappone*). Thus, the *Jefferson Parish* majority pointed out that the Court has long found such complementary products to be distinct. 466 U.S. at 19 n.30.

service even though it was much higher priced (double, in some cases) than preferred, higher quality service of ISOs, and that many ISOs were forced out of business while others lost substantial revenues. *See* J.A. 341, 414, 420-27, 474-76, 458-59, 463, 469, 482-84, 493-96, 501-02, 514, 614. Under the recognized tying-law standards, respondents thus have earned a trial on their claim of "forcing" through a tying arrangement between parts and service. *See Jefferson Parish*, 466 U.S. at 17 ("When the seller's share of the market is high, or when the seller offers a unique product that competitors are not able to offer, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate.") (citing *Fortner*, 394 U.S. at 504-06 & n.2, and *Times-Picayune Publ. Co. v. United States*, 345 U.S. 594, 611-13 (1953)).[9]

Respondents also have earned a trial on their monopolization claim under the recognized standards. Not only must it be accepted here that Kodak has an effective monopoly in the market for certain essential parts, but it is not disputed in this Court that Kodak took exclusionary action to maintain its parts monopoly (*e.g.*, J.A. 120, 428-29, 468, 496; Lodgings 150, 178). Nor is it open to question that Kodak is using its control over parts to strengthen its monopoly share (80-95%, *see* J.A. 345) of the Kodak service market.[10] And, perhaps most tell-

[9] Kodak does not argue that it is entitled to summary judgment on respondents' tying claim based on alleged business justifications, a defense that some lower courts recognize. *See* note 3, *supra*. Any such defenses, moreover, plainly raise factual issues that are hotly disputed. *See* pages 24-27, *infra*.

[10] Kodak lamely raises questions about some of those propositions (Kodak Br. 33-38), but it cannot seriously be denied that respondents have met their burden of raising genuine factual issues on the monopoly power question for trial. For example, in seeking to deny that Kodak service or parts constitute relevant markets, Kodak relies on this Court's statement in *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 393 (1956), that a single brand of a product does not *automatically* form its own market. Kodak Br. 33-34. That

ingly, respondents have offered evidence that, like the defendant in *Aspen*, Kodak terminated an existing relationship (Kodak sold parts to ISOs and their customers prior to 1986, *see* J.A. 99, 152, 349-50, 415-16) and thereby effected "an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Aspen*, 472 U.S. at 603. What remains, therefore, is the question of procompetitive business justification for the new Kodak policies. That question, however, cannot conceivably be resolved on summary judgment, for the validity and sufficiency of Kodak's asserted business justifications—quality control, inventory control, avoidance of free-riding—are obviously in serious factual dispute. *See* Pet. App. 12A-14A, 17A-18A.

3. *Kodak's Theory.* It is against this background that Kodak makes its argument for relief from this Court. Kodak insists that, notwithstanding its monopoly *share* of the relevant parts market and notwithstanding the elimination of the substantially lower priced, high-quality alternatives for Kodak service customers, Kodak does not actually have market *power*, in that it cannot "control prices or exclude competition." *duPont*, 351 U.S. at 391. In other words, Kodak is contending that the higher service prices it forced on Kodak customers are not super-

principle is obviously correct, but it cannot help Kodak. In this case, there is a genuine factual issue as to whether Kodak parts or service markets exist in real economic terms—that is, when "appraised in terms of the competitive market for the product." *duPont*, 351 U.S. at 393. It is the choices a Kodak equipment owner has available that determine the relevant market (*Jefferson Parish*, 466 U.S. at 19-23), and Kodak is not entitled to summary judgment on that question in the face of the evidence that certain necessary parts are uniquely available from Kodak (*see* Pet. App. 7A, 18A-19A). Notably, Kodak's discussion of this last point delicately avoids a direct denial that some key parts are uniquely available from Kodak. *See* Kodak Br. 37-38 (carry-over sentences). Nor does Kodak deny that it adopted its policies in order to eliminate independent competition in the service market. *See* J.A. 91-92, 422, 426-27, 455-56.

competitive prices. Kodak bases this claim not on any direct analysis of the parts and service markets, but instead on an inference it asks the Court to draw about those markets from a third market—the market for the equipment. In particular, Kodak urges this Court to hold, as a matter of law, that the existence of competition (the lack of market power) in the *equipment* market makes it impossible for Kodak to exercise market power in the *parts* market (or, therefore, the *service* market). Kodak Br. 14-33. Kodak summarizes its proposed rule of law as follows: "interbrand equipment competition precludes any finding of monopoly power in derivative aftermarkets." Kodak Br. 33.

Kodak rests its claim on this Court's holding in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), that an antitrust plaintiff cannot defeat a motion for summary judgment if its claim rests on a theory that "simply makes no economic sense." We fully endorse that principle, but even on first blush its application here is quite different from its application in *Matsushita*. There, conduct that produced direct and immediate benefits to consumers—*low* pricing—was challenged (as predatory pricing) on the "speculative" theory that such conduct was in the long run harmful to consumers. *Id.* at 588. Because the challenged low pricing was "the very conduct the antitrust laws are designed to protect," the Court said that the plaintiffs had a particularly heavy burden of persuasion to justify forcing the case to a burdensome trial. *Id.* at 594. This case is precisely the opposite: conduct that produces direct and immediate harm to consumers—higher (service) prices, which antitrust law generally aims to prevent—is being defended on the speculative theory that such conduct is, from a broader perspective, actually beneficial to consumers.

In these latter circumstances, the Court must take special care not to adopt as a legal rule barring liability an assertion about economic behavior and market functioning that rests on factual assumptions that may not mirror

reality. Here, as we next argue, Kodak's broad rule cannot be justified as a matter of law, for respondents' claim does make economic sense. Indeed, there are obvious reasons why Kodak's assertion may be false—why it is far from "inherently implausible" (Kodak Br. 30) to claim that the supposedly perfect inter-market disciplining mechanism relied on by Kodak may not function as Kodak suggests.

B. Competition In The Product Market Provides No Guarantee That A Seller Like Kodak Will Not Exercise Market Power In Charging For Parts And Service.

Kodak's theory for disregarding the facially anticompetitive effects of its policies rests on a straightforward factual claim:

> If Kodak raised its parts or service prices above competitive levels, potential customers would simply stop buying Kodak equipment. Perhaps Kodak would be able to increase short term profits through such a strategy, but at a devastating cost to its long term interests.

Id. at 12. As that passage itself indicates, and as Kodak elsewhere makes even more explicit, whether supercompetitive parts or service pricing is economically sensible for Kodak turns on a balancing of gains and losses: whether its gains from overcharging for service outweigh its losses in new sales. *See* Kodak Br. 25 (the question is whether "Kodak can make more total profit by overcharging its existing customers for service than it will lose as its new and repeat product sales dry up").[11] Where Kodak errs is in simply asserting, as *a priori* true, that the losses will always exceed the gains. *See, e.g., id.* at 12 ("devastating cost"), 22 (future loss in equipment sales "dooms" supercompetitive parts or service pricing), 26 ("inconceivable" that losses "would be outweighed" by gains). But the question, of course, is a factual one—how many

[11] The quoted statement is inaccurate in that it ignores gains from overcharging the *new* service customers that Kodak acquires by driving ISOs out of business.

equipment sales will be deterred, and at what per-sale loss, as consumers buy competitors' equipment? And the answer cannot merely be asserted or assumed. Indeed, there are obvious reasons why the exploitation of parts and service customers will not automatically lead new purchases to "simply stop" or to "dry up" so severely that antitrust law must assume, based on the ineluctable laws of economics, that no such exploitation can take place.

1. *Information Costs.* Kodak's inter-market disciplining mechanism depends entirely on the ability of consumers to integrate into their equipment-purchase decisions information about the prices being charged for parts and service—that is, to engage in lifecycle pricing at the point of initial purchase. Moreover, for Kodak's argument to work, such lifecycle pricing must be practical even if there is no competitive alternative to Kodak parts or service. This Court cannot accept that theory as legally compelled.

The plain fact is that difficulties in acquiring and using information may severely limit the extent to which new sales will be impaired by any supercompetitive aftermarket pricing. In markets like those at issue in this case (or in the high-end computer market), the information costs, and hence the practical difficulties with lifecycle pricing, are dramatically high.[12] And those difficulties cannot be swept aside, as a matter of law, by the assertion that "highly sophisticated customers" (Kodak Br. 23) will have adequate information to ensure that all customers are protected from supercompetitive pricing, for it is clear that sellers like Kodak can readily set different lifecycle prices for sophisticated purchasers from the monopoly prices that they are able to extract from unsophisticated customers.

a. The initial flaw in Kodak's analysis is that it rests on the untested assumption that potential purchasers of a

[12] Kodak vastly understates the matter when it acknowledges that consumers do not "ever have perfect information." Kodak Br. 24.

product will be able to know whether the pricing of parts and service is at a supercompetitive level and use that information in comparing the lifecycle prices of competing sellers of the product. That model of economic behavior seems perfectly plausible with respect to fungible products such as sugar or rice, which are purchased at a single point in time and then simply consumed. For such products, lifecycle costs roughly equal original cost. But the information and price-comparison costs are on their face much higher for non-fungible products such as copiers or computers: each such product may offer different capabilities that are hard to compare; the lifecycle costs are spread over many years and include many elements; and some of those elements (*e.g.*, future service) simply cannot be priced years before they are purchased. In this type of market, the barriers to acquiring information faced by consumers trying to make effective lifecycle pricing decisions may well be too high to guarantee competitive pricing in aftermarkets.[13]

Thus, consumers may not even be able to determine whether they are being charged supercompetitive prices

[13] The Court in *Jefferson Parish* recognized that information barriers may constitute a market imperfection. 466 U.S. at 15 & n.24 (tie-in may cause economic harm where consumers suffer from "an inability to evaluate the true cost of either product when they are available only as a package"). *See* Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 Boston L. Rev. 661, 676 (1982) ("It is by now fairly well-known that sellers tend to engage in less price competition where buyers have difficulty making price comparisons.") (footnote citing, *inter alia*, Salop, *Information and Monopolistic Competition*, 66 Am. Econ. Rev. 240 (1976), and Stigler, *The Economics of Information*, 69 J. Pol. Econ. 213 (1961)).

Kodak states (Kodak Br. 23) that *Jefferson Parish* rejected reliance on imperfect information, but that is wrong. The Court indicated that consumers' *indifference* to price (because of medical insurance) undermined any claim of forcing. 466 U.S. at 27-28. Here, as in the usual situation, consumers care about aftermarket prices but are hampered in their ability to acquire the necessary information in a cost-effective manner.

in a monopolized aftermarket. Indeed, by barring competitors from its service market, a company like Kodak eliminates the only readily available form of price comparison for service of *its* products. Kodak's proposed alternative—that its competitors in the equipment-sales market will apprise customers of its unduly high prices (Kodak Br. 26 n.11)—is dubious at best. Such a competitor is unlikely to have reliable information about the lifecycle costs of equipment it does not service, especially where the equipment is complex and individual customers' experiences vary widely. And in product markets that are served by a few large sellers, the sellers may end up tacitly concluding that a uniform practice of supercompetitive pricing would best serve all of them. *See generally* 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 404b, at 273-79 (1978) (oligopoly pricing).[14]

Even if consumers were able to obtain information about the servicing costs of each brand of equipment, they would still have to integrate that information into a comprehensive comparative lifecycle pricing decision. (After all, even if Kodak charges more than Xerox for service, that fact may be of no consequence if, for example, Xerox charges more for parts or if its machines break down more frequently.) The job of making lifecycle pricing comparisons requires a great deal of information. A consumer must acquire (1) initial purchase information—*e.g.*, prices, features, quality, and available warranties; (2) post-purchase information—*e.g.*, price, quality, and availability of products needed to use, upgrade or add to the initial equipment, as well as service and repair costs, including frequency of repair, magnitude of "down-time," and losses incurred from down-time; and (3) residual-value information—*e.g.*, the longevity of product use and its potential resale or trade-in

[14] In this case, for example, respondents allege that Kodak's only real competitor for high-volume copiers (Xerox) has adopted policies like Kodak's, designed to capture service of its product.

value. To make matters worse, this large body of information frequently changes during the life of a product—especially in a technologically advanced field—as companies change service prices over time and bring new products into the market, with more advanced features, a decreased need for repair, or new warranties. And lifecycle costs vary from customer to customer, as their types and degrees of equipment use vary.[15]

It is often quite difficult and expensive for consumers to obtain this complex body of information. Moreover, the expense must be judged in light of how important parts and service costs are in buying the product. If such costs are small relative to the equipment price (*e.g.*, for some large computers, annual service costs may be only 2% of equipment price), or if consumers are far more concerned about capabilities of the equipment than service costs, the relative value of the necessary information may be quite low. In such circumstances, it is especially unlikely that the information will be compiled.

Because it is so costly to do the necessary research for effective lifecycle pricing—including long-term studies of breakdown and repair costs—only large-volume users typically can afford to undertake it. The few customers who are likely to possess this information, however, are unlikely to share it with other customers (including *their* competitors), precisely because it is so valuable. In view of these market realities, it has long been considered indisputable that the best source of market pricing information is the charge made by competitors for the

[15] These kinds of lifecycle costs, in fact, are not even identical for each one of a given kind of product—some are "lemons," breaking down more frequently or taking longer to fix. Thus, a shopper must make predictive judgments not only about average lifecycle prices but about the range of such prices for particular brands as well. Further, some of these lifecycle costs are likely to be customer-specific: it is more costly for a travelling salesperson to have to leave his or her car in the shop for several days than it is for a retiree who drives infrequently.

same product or service. But that, of course, is exactly the information that Kodak is eliminating by its policies designed to destroy ISOs.

b. Kodak argues that none of this undermines its proposed legal principle because there will always be some large-volume, sophisticated purchasers who will do the comparative studies and insist that Kodak charge only competitive lifecycle prices or else lose their business. According to Kodak, such customers will hold down the lifecycle price for *all* Kodak customers, including those who have already bought equipment and now seek only parts and service. Kodak Br. 23. But, although normally such a group of informed consumers will exist, there are economically plausible reasons to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers as well.

There is simply no reason to assume that a seller cannot price discriminate between reasonably well-defined groups of potential customers, such as the sophisticated and unsophisticated. On the contrary, one of the virtues of complex lifecycle pricing is precisely that it permits numerous opportunities for price discrimination between groups of customers. The more complex the product, the greater the opportunity to vary the contents of the "package" (Kodak Br. 23) being sold to different consumers, including different elements in the package (*e.g.*, warranties) or offering price discounts on different components. And for present purposes, the "sophisticated" are likely to be easy to identify: they are the high-volume customers for whom it is economically worthwhile to acquire the complex information needed for comparative lifecycle pricing. Such customers, indeed, may identify themselves.

This case seems to provide an illustration of exactly that kind of price discrimination. In particular, Kodak's policy is to sell parts to customers who service their own

equipment. Those companies that will sensibly be able to afford their own service staff, however, are likely to be high-volume users—*i.e.*, the same companies that are likely to be able to engage in complicated lifecycle decisionmaking in the first place. The suggestion that Kodak's self-service exception is intended to facilitate price discrimination is especially strong here, because Kodak has offered no alternative reason for the exception.[16]

2. *Switching Costs.* In addition to the magnitude of the pertinent information costs, there is a second significant reason why the charging of supercompetitive aftermarket prices will not necessarily lead to more-than-offsetting reductions in sales of the product. Any reduction in sales is directly limited by the potentially high cost of switching to a different product, a phenomenon the court of appeals described as the lock-in effect. Pet. App. 81. *See* 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 519a, at 349 (1978) (shifting to substitute product may be costly because necessary complementary investments—*e.g.*, in factories—may be product-specific). The fewer the sales losses, of course, the more favorable to the seller is the loss-gain balance that determines how unlikely monopoly pricing in the aftermarkets truly is.

Kodak claims that it would be "impossible" for a seller in a competitive product to exploit locked-in customers because " 'as soon as word [of the tie-in] got out no one

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[16] By providing for such an exception in the service market, Kodak's policy may also enable it to avoid the restrictions on price discrimination in the parts market that are imposed by the Robinson-Patman Act—restrictions that may limit Kodak's ability fully to exploit its monopoly power in the parts market alone. *See* page 9, *supra*. Further, in highly technical markets, the tying of service and parts may also add to market power in parts by helping the seller influence or control its customers' information about the competition: service providers will often be the principal source of advice about which parts (or, indeed, equipment) a customer can or should buy.

would buy' " the original product. Kodak Br. 25-26 (quoting *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 141 (1989) (Posner, J., dissenting)). But even if the "word" did indeed "get out" immediately (as often it will not, *see* pages 16-21, *supra*), it hardly follows that a seller could not enjoy monopoly profits in its aftermarkets. That determination depends on just how locked-in a market is—the magnitude of switching costs and the size of the locked-in base relative to the number of new purchasers—as well as on whether a seller can price discriminate between its locked-in customers and potential new customers. Both of those inquiries raise questions of fact, not law.

In the first place, the extent to which customers' switching costs are high clearly varies from one type of equipment to another. For example, if a toaster-oven manufacturer tried to charge monopoly prices for service or parts, customers would readily change to another brand because the cost of switching is relatively low. By contrast, for the purchaser of a sophisticated computer, the cost of switching is frequently prohibitively high. That is so partly because the equipment itself is expensive (often costing millions of dollars) and bought with the understanding that it will be used for many (perhaps 10 or more) years. In addition, the computer likely will be part of a larger system including other equipment (*e.g.*, printers, disk drives, memory devices, etc.) designed to be compatible with the computer; expensive software may have been written or purchased specifically for the installed brand of computer; and it may be extremely expensive to retrain a workforce to use a different kind of computer system. An owner of such equipment would incur substantial costs in shifting to new equipment, costs that may exceed the burden of even many years of supercompetitive parts or service pricing.

The relative balance of gains and losses from exploiting customers that face high switching costs, of course, depends on the size of that locked-in base compared to the number of new purchasers. In a developed market for long-life products, the locked-in base typically will be large relative to the pool of new buyers. For example, most potential purchasers of large computers today already own such equipment. As a result, the market for complex computers is locked-in to a very high degree: the large majority of potential customers have already chosen the manufacturer that they intend to stay with, at least barring major, unforeseen circumstances; and most purchases are made by prior owners of the same manufacturer's computers. The existence of such a significant, market-wide lock-in provides a seller with a substantial degree of shelter for supercompetitive pricing in its aftermarkets. In such circumstances, there is no basis for excluding the possibility, as a matter of law, that a seller can make more money by charging such prices than it would lose as a result of foregoing new customers who are aware of, and deterred by, this pricing practice.

Beyond that, a seller may even be able to avoid this choice altogether, or to a large extent, by discriminating in price between locked-in and new customers. For example, a seller with a significant installed base can offer new customers an overall lifecycle price that is competitive by pricing its equipment below the market price and then recouping the loss by charging them the supercompetitive price on parts and service that is charged to the installed base. Alternatively, if the cost of service and repair deters a large number of new equipment sales, the seller can address that issue directly by offering a lifetime warranty or long-term service agreement that is not available to customers who are locked in.

Kodak's ability to take advantage of a lock-in effect would seem to be closer to that of a large-computer manufacturer than to that of a toaster-oven manufacturer. Respondents have alleged price discrimination (*see* pages 20-21, *supra*) and a substantial lock-in effect at least for

certain of the submarkets for expensive Kodak equipment. *See* J.A. 424-25, 467, 487-88. Kodak's argument in this Court, far from showing persuasively that no triable issue is presented on that factual question, concentrates on urging that the lock-in effect is essentially irrelevant. *See* Kodak Br. 24-27. For Kodak to prevail, it would have to be clear beyond genuine factual dispute that no significant switching costs, and no price discrimination, gave Kodak a cushion for the charging of supercompetitive prices. No such conclusion can be justified here.

3. *Procompetitive Justifications.* Kodak offers three "procompetitive" justifications for its exclusive service policy, claiming that this proffer defeats respondents' monopolization and attempted monopolization claims.[17] "There are three main business reasons for Kodak's refusal to sell parts to ISOs: (1) to promote interbrand equipment competition by allowing Kodak to stress the quality of its service; (2) to improve asset management by reducing Kodak's inventory costs; and (3) to prevent ISOs from free riding on Kodak's capital investment in equipment, parts and service." Kodak Br. 6; *see id.* at 6-8, 38-40. Initially, however, such policies cannot establish, as a logical matter, Kodak's central legal argument: that its pricing of parts and service simply *cannot be* the result of market power because the equipment market is competitive. And, in any event, the claims, far from being self-evidently true, raise obvious factual questions—indeed, are dubious even on their face.

Kodak first asserts that, by preventing customers from using ISOs, "it [can] best maintain high quality service for its sophisticated equipment" and avoid being "blamed for an equipment malfunction, even if the problem is the result of improper diagnosis, maintenance or repair by an ISO." Kodak Br. 6-7. Aside from the fact that Kodak has offered no evidence to indicate that ISOs have been providing "inferior" service or that Kodak was actually

[17] As noted above, Kodak does not argue the relevance of such defenses to respondents' tying claims. *See* note 9, *supra*.

concerned about quality—and respondents have offered evidence to the contrary (J.A. 424-26; Lodgings 126, 133)—Kodak's suggestion is counterintuitive. To overcome the natural competitive advantage that Kodak has in the service market for *its* products, an ISO would have to be more efficient, not less. It is also particularly ironic that Kodak would suggest that its customers are too unsophisticated to avoid inferior service when its basic argument is that these same customers are sophisticated enough to make complex and subtle lifecycle-pricing decisions and thereby prevent Kodak from taking advantage of its monopoly. There is no reason why informational sophistication should be present in one circumstance and absent in another. In any event, Kodak's argument hardly seems consistent with its own policy of exempting self-service customers, who might also develop "inferior" service and who, if anything, are more likely to blame Kodak's equipment if their own employees cannot fix it.

Kodak's second justification—controlling inventory costs—is even more patently suspect. The simple fact is that the inventory of parts needed to repair Kodak machines should turn only on breakdown rates. Those rates should be the same whether Kodak does the repair or ISOs do it.

Kodak's argument about preventing free riding is likewise questionable, at least in this case. In Kodak's view, apparently, "free riding" can be invoked whenever a product creates derivative markets—*e.g.*, without copiers, there would be no service market—and can entitle the manufacturer of the product to insist on a monopoly in *all* derivative markets—*e.g.*, gasoline for cars, home repairs for houses. But that view has nothing to do with the concept of free riding that this Court has discussed in prior antitrust cases, such as *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), which is relied on by Kodak.[18] Rather, free riding could be relevant here

[18] *GTE Sylvania* involved a manufacturer's policy of restricting the number of retailers that could sell its product. In that con-

only if Kodak were absorbing a cost in one market and then seeking to recoup the loss by above-cost pricing in a derivative market. In that situation, Kodak's overall lifecycle price might be competitive and ISOs might be "free riding" on Kodak's loss-generating investment in creating the derivative market.[19] But even if such a claim could justify a tying arrangement, for example, rather than lead to an insistence on cost-based pricing in the primary market, it is not at issue in this Court.

Most significantly, Kodak itself has never claimed that it has subcompetitively priced its equipment or parts (*i.e.*, priced them below marginal cost), even though the factual evidence to support such a claim (if it were true) would be readily available to Kodak. Certainly, this Court cannot simply assume that Kodak is doing so and award summary judgment on that basis. Indeed, such an argument is facially inconsistent with the fact that Kodak allows its customers to service their own products. If a free-riding theory applied here, Kodak would have to be losing

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text, the Court explained, the policy served the procompetitive goal of allowing new manufacturers to "induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." 433 U.S. at 55. Without a restriction on retailers, however, "these services might not be provided" because any retailer could free ride on another's efforts. *Ibid.*; *see also Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-63 (1984).

[19] The United States, stating that "resolution of [Kodak's] business justification issues [is] unnecessary" (U.S. Br. 24 n.23), relies on this theory throughout its brief in arguing that the Court should not be concerned about the undisputed fact that ISOs charged significantly less than Kodak for service. *Id.* at 14-15 & n.12, 18 & n.16. Specifically, the United States says that Kodak may be following a "marketing strategy of spreading over time the total cost to the buyer of Kodak equipment" (*id.* at 18)—in other words, charging below-cost prices for its initial equipment and then making up the difference by charging supercompetitive prices for service, with an overall price that is competitive. As explained in text, the government's theory is not merely speculative in general but insupportable on the evidence in this case.

money on its self-service customers, because it is not receiving any service revenues from them to recoup its parts and product losses—unless, of course, Kodak is engaging in price discrimination by charging such customers *more* for equipment or parts than it charges other customers. Not surprisingly, Kodak has not made any such claim. Free riding, in short, is not an issue here.

CONCLUSION

Kodak's argument should be rejected, and the judgment of the Ninth Circuit affirmed.

Respectfully submitted,

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Petitioner,

v.

IMAGE TECHNICAL SERVICE, INC., *et. al,*

Respondents.

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Brief Of The Amici Curiae Automotive Warehouse Distributors Association, Automotive Body Parts Association, Automotive Engine Rebuilders Association, Auto International Association, Automotive Parts And Accessories Association, Automotive Parts Rebuilders Association, Automotive Service Association, Automotive Service Industries Association, International Mass Retail Association, National Independent Automobile Dealers Association, And Specialty Equipment Market Association As Amici Curiae In Support Of Respondent

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PRELIMINARY STATEMENT

With consent of the parties, the Automotive Warehouse Distributors Association, Automotive Body Parts Association, Automotive Engine Rebuilders Association, Auto International Association, Automotive Parts and Accessories Association, Automotive Parts Rebuilders Association, Automotive Service Association, Automotive Service Industries Association, International Mass Retail Association, National Independent Automobile Dealers Association and Specialty Equipment Market Association (collectively, "independent auto aftermarket associations") submit this brief *amicus curiae*. This

brief will argue for upholding the decision of the United States Court of Appeals for the Ninth Circuit. To do otherwise could establish an erroneous presumption that the existence of inter-brand competition for original sales of durable equipment can by itself be sufficient to discipline prices in service and replacement parts markets from which independent competition has been excluded.

Such a presumption would obliterate the distinctions between the market for new equipment and the distinctly separate markets for replacement parts and service. Without that distinction, the antitrust protection otherwise available for firms in the parts and service markets would be lessened or removed. This brief endorses the discussion contained in the Respondent's Brief on the Merits (Sept., 20 1991).

THE INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

The associations listed as *amici curiae* on this brief are trade associations whose members do business in the independent automotive aftermarket, including the sale of used vehicles. The combined membership of these associations comprises more than 45,000 firms operating at every level of the automotive aftermarket, including used vehicles sales, parts manufacture, rebuilding, distribution, wholesaling, retailing and vehicle service.

The independent automotive aftermarket is comprised of those firms in the replacement parts and service markets which are not affiliated with the vehicle assembly companies. At present, the independent automotive aftermarket comprises a much larger share of the parts and service markets than does the car company-affiliated sector. More than 90% of the nation's 390,000 retail automotive service establishments are unaffiliated with any of the vehicle assembly companies. At least

seventy five percent of all service and repair work is done by independents in vigorously competitive markets where price and quality are paramount consumer concerns. The independent sector is also the major source for replacement parts, both new and rebuilt, moreover many manufacturers of replacement parts sell both to the car companies and through independent distribution channels. In many instances the same part will be sold in different boxes — one with a car company label, one with an independent label.

Like Kodak, the vehicle assembly firms, do not manufacture the vast majority of the components used in the assembly of their equipment. The vast majority of parts used for equipment assembly and as replacement parts are obtained through outside purchases from parts manufacturing firms.[1] When an equipment assembly firm acts not in its capacity as an equipment assembler but instead as a buyer, distributor, wholesaler and/or retailer of replacement parts, its actions in those markets or distribution levels should be recognized as actions undertaken in markets distinct and separate from the market for new equipment.

The concern of these associations with respect to the issues presented in this case is that a reversal of the decision of the United States Court of Appeals for the Ninth Circuit would encourage vehicle assembly companies to institute tying arrangements whereby control over selected classes of replacement parts would be used to control related but distinct markets for automotive service and parts.

The ready availability of replacement parts is the lifeblood of any service industry. A significant foreclosure of parts availability for the purpose of eliminating competitors in the

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[1] *See*, Petitioner's brief on the Merits at 37-38(Conceding that Kodak obtains many parts from other manufacturers and discussing Respondents' estimate that 90% of Kodak's component parts are obtained from outside firms).

service industry is a cognizable antitrust injury and likely evidence of market power. The elimination of competitive service alternatives also subjects parts suppliers to a form of monopsony in which the tying equipment assembler acting as a replacements parts distributor/reseller becomes the only remaining customer for replacement parts. Lastly, users, sellers and rebuilders of existing equipment would be hostage to parts and service pricing policies of equipment assemblers which would be determined in a non-competitive environment.

It is of particular concern to the independent automotive aftermarket *amici* that the trial court relied on an erroneous and grossly oversimplified economic model of a complex industry analogous in many respects to the automotive industry. This had the effect of concealing the enormous potential for anticompetitive harm in Kodak's parts distribution policy. A presumption that competition in original equipment markets can alone undo anticompetitive injury in parts and service markets is erroneous as a matter of economics. This presumption grants equipment assemblers *carte blanche* to pursue grossly anticompetive objectives when they act in the capacity of parts resellers and service providers.

The record below also suggests that the imposition of this erroneous economic presumption by the trial court was a root cause of the restriction of plaintiff's discovery into issues related to the relationship between the equipment assembler and parts manufacturers with respect to parts sales to independents. This is an indication that reliance on this offending presumption not only distorted the economic analysis of the case but unfairly increased the burden on the plaintiff.

The independent automotive aftermarket *amici* want to make it clear that the history of the automotive industry demonstrates that interbrand competition for vehicle sales has never operated as a check on replacement part prices and cannot be relied upon to do so in vertically monopolized parts and

service channels in the automotive industries or in analogous industries. It is important that the erroneous economic model relied upon by the trial court below not be approved as a substitute for factually based economic analysis.

The relevant experience of the automotive industry can be explained as a function of the economics of durable goods. Any attempt to tie future sales of parts and service to the sale of durable equipment ought to be especially suspect because (1) the purchase of complex, long-lived equipment is invariably made on the basis of criteria other than maintenance costs and thus price increases for maintenance are easily concealed or overwhelmed by other considerations; (2) the elimination of an independent service sector leaves replacements parts manufacturers and rebuilders at the mercy of a single powerful buyer; and, (3) equipment makers have a disincentive to permit the use of existing, older equipment to remain a cost-effective alternative to the purchase of new equipment. Therefore, tying arrangements involving equipment and the replacement parts and service should be found harmful *per se*.

The independent automotive aftermarket *amici* offer in this brief an outline of the economics of the automotive aftermarket in order to illustrate how and why tying arrangements of the kind at issue in this case are inherently harmful. Additionally, these *amici* would like to briefly summarize how the relevant economics of this industry have been reflected in litigation and have influenced the decisions of the Congress with respect to environmental regulation of automobiles.

ARGUMENT

THE EXISTENCE OF INTERBRAND COMPETITION FOR ORIGINAL EQUIPMENT SALES CANNOT PREVENT MONOPOLISTIC PRICING IN SERVICE AND REPLACEMENT PARTS MARKETS WHERE INDEPENDENT COMPETITION HAS BEEN EXCLUDED

The economics of durable equipment is such that consumer decisions concerning long-term maintenance costs are largely severed from the decision processes that govern purchase of the original equipment. This is a function of the time separating the purchases, the disparity in the criteria governing equipment purchases versus those governing purchases of parts and service and the cost of acquiring information. Where parts and service must be obtained in a single monopolized market for both parts and service, there are significant opportunities to extract monopoly profits without any corresponding corrective impact in the market for new equipment.

A. The Economics of Durable Equipment Severs the Impact of Downstream Maintenance Costs on Equipment Sales

A distinctive feature of the economics of durable goods (such as commercial copiers or automobiles) is that the continued availability of existing older equipment reduces the demand for new equipment. *See*, Coase, *Durability and Monopoly*, 15 J. L. Econ. 143 (1972). Before a consumer makes a selection within the market for new equipment he or she must first decide to forgo the purchase or the continued use of an older piece of equipment.[2] In the automobile industry for example, of the more than 175 million cars and trucks currently in use in the United States, more than 70% are at least four years old and more than 40% are nine years or older. Motor Vehicle Manufacturers Association, *MVMA Facts & Figures 1991* at 28. This means that the majority of vehicle owners maintain an out-of-warranty, older piece of equipment rather than purchase a new vehicle. Millions of vehicle owners have purchased their vehicles second or third hand and purchase all parts and service

[2] The availability of used automobiles has a profound impact on the sale of new vehicles. An example of a demand forecasting model incorporating this factor can be found in Winston et al., *Blind Intersection, Policy and the Automobile Industry*, 36-60 (Brookings Institution 1987).

solely from the independent aftermarket. Three-fourths of all automotive aftermarket sales are made through independent service providers.

The economics of durability has a profound impact on the incentive structure of assemblers of durable equipment. If new equipment assemblers began to wage vigorous competition for new equipment sales largely on the basis of product durability in combination with low-maintenance costs they would do so in a shrinking market. They would find that consumer demand was increasingly filled by older pieces of equipment. It is therefore in the collective interest of any equipment industry to move the field of competition away from an emphasis on durability towards an emphasis on innovative features and styling. This lesson is well-applied in the automobile industry where competition takes place in a number of distinct market niches defined entirely by styling issues and equipment base price.[3]

Another aspect of the economics of durability is that the consumer who buys equipment when new may not be the same person who will buy parts and service in later years after the express warranty expires.[4] Style and purchase price are the dominant, if not sole concerns of the original purchaser. When consumers invest time and effort to obtain information prior to a new vehicle purchase, they tend to focus most heavily on obtaining a particular style of vehicle for the lowest possible purchase price. Punj and Staelin, *A Model of Consumer Information Search Behavior for New Automobiles*, 9 J. Consumer Res. 366 (1982). Any awareness of disparities in the cost of

[3] Studies have long shown that consumer preferences are greatly affected by styling changes. *See, e.g.*, Sherman and Hoffer, *Does Automobile Styling Change Pay Off?*, 3 Applied Econ. 153 (1971).

[4] At the time of vehicle purchase, the majority of consumers expect to keep the vehicle for five years or less. *MVMA Facts & Figures 1991* at 46.

maintaining a vehicle may be obliterated by the common misperception that the vehicle will remain free of any defects during the warranty period. *See, e.g., Hearings on Warranties and Guaranties before the House Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970); Federal Trade Commission, *Staff Report on Automobile Warranties*, (1968). Published studies on consumer satisfaction with vehicle performance are usually done on vehicles still within the express warranty period so that accurate consumer data on the likely longer term costs of repair is difficult to obtain. *See, eg.*, Kiley, *Measuring the Full Life of a Car*, 32 Adweek's Marketing Week 57, (March 11, 1991) (discussing benefits of the decision of J.D. Power & Associates to develop longer term surveys of auto consumer satisfaction).

Consumer perceptions in such a market are largely immune to all ~~but~~ the grossest, sustained disparities in long-term maintenance costs. The psychological effects of express warranties, the typical succession of ownership of vehicles, the disparity in intensity of use, the variance in performance within the same vehicle model in successive vehicle years and the difficulty in obtaining accurate future cost information combine to eradicate the effect supercompetitive pricing might otherwise have on new equipment sales. Because consumers are unable or unwilling to focus significantly on repair prices, the car companies have little or no incentive to compete significantly on that basis. *See*, Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488 (1970).

The studies cited by the independent aftermarket *amici*, *supra*, and the collective experience of their industry flatly contradict the model of consumer behavior offered by Petitioner. *See*, Petitioner's Brief on the Merits at 4, 19-20 (arguing that consumers directly translate any increase in part or service costs into an equivalent increase in equipment price). The complexity of the purchase decision itself, the effect of

express warranties, variations in intensity of use and perceptions of risk[5] all serve to blunt any effect that supercompetitive pricing in monopolized parts and service markets may otherwise have on equipment sales. In order for any market pressures to come to bear on prices for parts and service the true cost of repair would have to be made available in some meaningful way at the time of sale and the evaluation of such information must not be overwhelmed by other considerations.

B. Competition in the Market for Vehicle Sales Cannot Discipline Prices in Vertically Monopolized Markets for Parts and Service

The crux of the economic argument advanced by Petitioner and endorsed in the Brief of the United States as *amicus curiae* is that an increase for prices in service and or parts in an exclusive aftermarket would necessarily entail a proportionate loss of sales or a decrease in the price for equipment sales. Petitioner's Brief on the Merits at 3-4; Brief of the United States at 12-14. Similarly, Petitioner's *amici* Motor Vehicle Manufacturers Association and Association of International Automobile Manufacturers ("MVMA & AIAM") argue that:

> It is unrealistic to suppose that automobile manufacturers could exercise any hypothetical market power by raising prices of replacement parts or service; if they tried to do so, many consumers would perceive it as an increase in the price of new vehicles and the manufacturers would lose sales.

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[5] There are indications that persons with less education and lower income are more risk averse and much more likely to overspend on parts and service where such purchases are offered in the form of extended warranties available at the time of the equipment purchase. *See*, Center for Policy Alternatives, Massachusetts Institute of Technology, *Consumer Durables: Warranties, Service Contracts and Alternatives* (1978); Shimp and Bearden *Warranty and Other Extrinsic Cue Effects on Consumers' Risk Perceptions*, 9 J. Consumer Res. 38 (1982).

Brief of *amicus curiae* Motor Vehicle Manufacturers Association and Association of International Automobile Manufacturers at 5.

This argument about loss of sales presumes that a competing vehicle assembler will intervene and capture a larger market share of new vehicle sales pursuant to any increase in part prices by any one car assembly firm. The hypothetical competitor would supposedly step forward and compete on the basis of lower parts and service prices. However, in order for the hypothetical competitor to compete on this basis with the tying monopolizer of parts and service, it must first forgo its own opportunity to reap supercompetitive prices in similarly tied markets for service and parts for its own equipment. This would certainly be an enormous sacrifice for a distribution monopolist in the automotive industry. Current new car dealer prices for many replacement parts (even *with* competition from independent sources) often run anywhere from 25% to 75% higher than competitive levels. If exclusive control of the markets were established, it is unlikely that the equipment firm would give up certain supercompetitive profits of this (or more likely, greater) magnitude in exchange for future, potential marginal increases in sales in the various distinct, shifting, style-driven markets for equipment sales.

The hypothetical competitor would have to hope that his comparative generosity with respect to parts and service prices over a significant time period will be sufficiently conspicuous to persuade consumers to buy the hypothetical competitor's equipment despite vigorous competition in niche markets overwhelmingly driven by issues of styling, features and equipment base price. If the automotive industry is any guide, the hypothetical competitor of Kodak would quickly relinquish the risky pursuit of the future bird

in the bush and seize his birds in the hand in the form of supercompetitive profits in parts sales and service safe in the knowledge that all of his competitors will do the same.[6]

The tendency for the vehicle assemblers to take the bird in the hand is born out by the ancient struggle between the car companies and their new car dealers over control of the source of replacement parts. This battle has generated a long and instructive litigation history. *E.g.*, *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936); *Miller Motors, Inc. v. Ford Motor Company*, 252 F.2d 441 (4th Cir. 1958); *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); *Metrix Warehouse, Inc. v. Mercedes-Benz of North America, Inc.*, 828 F.2d 1033 (4th Cir. 1986) *cert. denied*, 486 U.S. 1017 (1988); *Grappone, Inc. v. Subaru of New England, Inc.* 858 F.2d 792 (1st Cir. 1982). In each of these cases, a new car dealer sought to enhance his competitiveness in the retail service market by buying lower-priced parts from independent sources only to be opposed by a franchisor vehicle assembler.

Under the theory advanced by Petitioner and endorsed in the Brief submitted by the United States, all of this bitter and expensive struggle over the past fifty years between the car companies and their dealers could have been easily avoided. The car company in each instance could have lowered replacement part prices to a point at or below that offered by independent competitors. This would have driven out the competition and satisfied the wishes of the new car dealers. The ensuing loss of revenue to the vehicle assembler would have been offset by a proportionate increase in new car prices.

---

[6] Predictably, Kodak's chief competitor, Xerox embarked on a similar restrictive parts distribution program shortly after Kodak implemented the program now being challenged by Respondents.

Presumably, consumers would have been indifferent to this shifting of costs from parts to equipment price. The fact that this strategy has not been undertaken by any foreign or domestic vehicle company operating in the United States is a strong indication that these markets simply do not, and never have functioned in the manner outlined by Petitioner and its *amici*.

It is instructive to compare the actual behavior of vehicle and copier assemblers to the idealized competitive situation outlined by the Petitioner, *e.g.*: "a competitive supplier selling at the prevailing price and attempting to impose a tie-in upon a buyer, would merely be displaced by a seller who did not." Petitioner's Brief on the Merits at 19 (quoting Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19, 20 (1957)). In reality, the competing equipment assemblers are far more likely to follow suit than compete in either market for all of the reasons discussed in this section and the previous one. The model relied upon by Petitioner may indeed be serviceable when the corner grocer ties flour to sugar but it has little or no applicability in the markets in which Petitioner actually operates.

What is missing from the Petitioner's analysis is the fact that lower prices for replacement parts and service also has the effect of extending the life and value of older equipment. If some of the demand for equipment is being filled by used equipment, then the demand for new equipment is reduced. Control over the cost and availability of all aspects of maintenance permits the equipment maker (rather than the consumer and the market) to set the value and life span of older equipment.

It is also noteworthy that the trial court apparently presumed that the economic life of the tying equipment is immutable and not affected by the pricing of parts and service. *Image Technical Services, Inc. v. Eastman Kodak Co.*, No. C-87-18-WWS at 3 (N.D. Cal. April 18, 1988)(WESTLAW 1988 WL 15332)(Memorandum of Opinion and Order Granting

Summary Judgment) ("customers who have purchased Kodak equipment in a competitive market will tend to retain that equipment for its economic life.") However, the life of that equipment will be largely dictated by the cost and availability of parts and service. Where an assembler of durable equipment gains control of parts and service, and therefore of equipment life span, an equipment sale functions more like a lease of arbitrary duration in which the lessee assumes all risks. This is market power, indeed.

C. The Injury Which Would Result from the Removal of Independent Competition in the Parts and Service Markets Would be Sufficiently Significant to Warrant a *Per Se* Application of the Antitrust Laws

Given the complex economics of durable equipment and their maintenance, it is unreasonable to argue that competition in the sale of equipment can restrain prices in monopolized markets. The elimination of lower-priced independent competitors alone virtually guarantees such an increase. A remaining issue is whether the potential increases will be of sufficient significance to warrant *per se* application of the antitrust laws. The independent auto aftermarket *amici* argue that such application is warranted and necessary.

Even the example cited by Petitioner illustrates the potential for harm in such tying arrangements. Petitioner endorses Judge Posner's dissenting opinion in the *Parts & Electric* case. Petitioner's Brief on the Merits at 20-21, 26(citing *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228 (7th Cir. 1988), *cert. denied*, 110 S.Ct. 141 (1989). In dissent, Judge Posner wrote:

> Sterling could in principle exploit its "monopoly" by setting its price for replacement parts just below the point at which owners of Sterling motors would decide to scrap the

> motors rather than pay exorbitant prices for the parts necessary to keep them in service. But this would be a short-run game, since as soon as word got out no one would buy Sterling motors.

Id. at 236.

This analysis would be valid if Sterling had only two options—setting part prices at competitive levels or setting prices at conspicuously ruinous, extortionate levels. Under those circumstances, there would be a foreseeable impact in the market for new equipment. In actual practice, however, there is a lot of room in between those two decision points and every point in between represents supercompetitive, monopoly profit. The fact that there is an upper limit as to how much can be extracted is not a demonstration that allocative efficiency has been enhanced or that competition is alive and well. Nor does the presumed existence of an ultimate ceiling on the rate of overcharge for parts justify the additional assumption that there would also be proportionate corrections for overpricing done on a smaller scale. For the reasons discussed at length *supra*, this additional assumption is invalid.

In practice, Judge Posner's example is reducible to a situation in which the tying equipment assembler does have significant market power and can charge significantly higher prices in the tied markets. The only check on such prices is that they must be less than the amount required to force the consumer to scrap his equipment altogether. The functional difference between this limitation and outright monopoly power is difficult to discern. The power to impose significantly higher prices itself suggests the existence of market power irrespective of tying equipment market share. *See*, Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L.Rev. 1805, 1847

(1990)(arguing that high profit levels are *per se* indications of market power).

The program instituted by Kodak would allow Kodak to keep prices for new equipment at current levels while shifting the burdens of uncertainty, market risk, and the cost of acquiring information onto the consumer in the form of higher prices for parts and service. Additionally, Kodak can also be assured from the evidence of analogous industrial history that instead of competitive pressure there will be emulation by, not competition from, other equipment assemblers.

The assumption that replacement parts and service prices are passively integrated into the perceived price of equipment sales is not only erroneous but serves to conceal broad opportunities to constrict consumer welfare and destroy competition in distinct markets. A tying arrangement involving (1) equipment and (2) the means to maintain that equipment over time would grant to the tying seller a range of anticompetitive opportunities not otherwise available where parts and service markets are competitive.

Under a program of exclusive control of parts and service by an equipment manufacturer, price discrimination against older machines or particular classes of equipment would become possible by means of selective increases in part prices. The tying seller would be able to remove less profitable classes of machines from continued use altogether when it suited his purposes. Costs could also be shifted away from favored users onto others. Obsolescence in original equipment could be prematurely ordained and exploited. Instead of allocative efficiencies arising from competition in both the equipment sales market and in the parts and service markets, the equipment maker could dictate both the uses and intensities of use of its equipment. It is untenable to maintain that this kind of situation is the functional equivalent of distinct, competitive markets for new equipment, used equipment, parts and service.

Nor is it reasonable to claim that such sweeping economic power could be justified as merely another means of promoting interbrand competition. It is implausible that consumer dissatisfaction with inferior (independent) service would redound to the detriment of the equipment assembler as Petitioner claims. Petitioner's Brief on the Merits at 7(arguing that Kodak, in its capacity as an assembler of new equipment, would be blamed for deficient service performed by an ISO.) Unlike monopoly pricing of parts and service in exclusive markets, the cost and consequence of poor service are quickly discovered. It is far more likely that consumers will seek out a new service provider rather than simply nurture a grudge against the equipment maker for the remaining life of the equipment. The very fact that a consumer sought out and contracted with an independent service provider in the first place demonstrates that the consumer was aware of the option to deal with a new service provider. If anything, the independent service provider is under *more* pressure to establish a reputation for quality and low price than is an equipment company-affiliated service provider who may benefit from a presumption of expertise.

As for Petitioner's claim that exclusion of service competition is justified by the necessity to reduce inventory costs, the independent automotive aftermarket *amici* merely wish to point out that there is evidence in the record that the Respondents did attempt to establish independent channels of replacement parts distribution. Joint Appendix 429, 468, 496. If Kodak did in fact attempt to block the development of an arrangement that would certainly have lifted the alleged burden of additional inventory costs, then the claim is without merit.

The validity of Petitioner's claim that the Independent Service Organizations were "free riding" ought to be examined in light of the fact that Kodak, like a vehicle assembler, does not make the vast majority of component parts used in the assembly of its equipment. The investment made by the actual parts

manufacturer in both the design and the efficiency of the manufacturing process for component parts is at least as great as that made by the equipment assembler. Kodak can recoup its investment through the sale of new equipment, but the parts manufacturer may require access to the replacement parts market in order to recoup its investment. *See, e.g.* Zelenitz, *Below-Cost Original Equipment Sales as a Promotional Means*, 59 Rev. Econ. Stat. 438 (1977)(discussing pricing strategies of automobile component manufacturers and methods of estimating future replacement parts demand). However, if the equipment manufacturer is the only buyer in the replacement parts market by virtue of elimination of all other service providers, then the interests of the actual parts manufacturer will be hostage to the intentions of the equipment assembly firm.

For all of the reasons discussed *supra*, the tying of parts and service to the sale of new pieces of durable equipment merits *per se* application of antitrust law. The potential for harm is inherently substantial.

D. In the Clean Air Act Congress Expressly Recognized the Nature of the Anticompetitive Injury Inherent in the Exclusion of Independent Automobile Parts and Service Providers

A further example of the nature of the economics of the automotive aftermarket can be found in the legislative history of those provisions of the Clean Air Act dealing with automobile emissions. Legislation creating long-term warranty and emissions performance obligations for vehicle assemblers could have had the unintended effect of bringing vehicle owners into a compulsory service customer relationship with the car companies. From the enactment of the Clean Act Act in 1970, the independent automotive aftermarket consistently and unanimously opposed broad, long-term, mandated emissions warranties on vehicle exhaust systems on the grounds that such warranties would cause a large volume of "drag along" repair work to be shifted away from more

competitive independent service providers. *See, Monopolistic Tendencies of Auto Emission Warranty Provisions: Hearings Before the Subcommittee on Environmental Problems Affecting Small Business of the Permanent Select Subcommittee on Small Business, House of Representatives*, 93rd Cong. 2d. Sess. (1974).

Congress responded in a highly detailed manner to the potential problems created by the warranties mandated by the Clean Air Act . The carefully enumerated delineation of major emissions components and other emissions-related auto parts in both the 1977 and 1990 amendments to the Clean Air Act were due solely to Congress' concerns about the anticompetitive effects of a statutorily mandated warranty relationship between consumers and the car companies. Sections 203 and 207 of the Act as amended in 1977 also prohibited any vehicle assembler from requiring the use of name brand parts when replacing emissions-critical parts. 42 U.S.C.A. §§ 7522, 7541(1983).

Congress also established a requirement in the 1990 amendments to the Clean Air Act that motor vehicles be equipped with electronic diagnostic devices. Again, solely in deference to the potential for anticompetitive injury, Congress mandated that these devices be standardized with respect to connecting fittings for diagnostic equipment in service shops and also banned proprietary encryption of stored diagnostic data. *See, eg.*, 136 Cong. Rec. S3271 (daily ed. March 27, 1990) (statement of Sen. Gore)(the open diagnostics provisions are "an effort to make certain that we do not inadvertently curtail a vehicle owner's right to choose where he or she pays to have their car or truck repaired, nor thwart competition in the repair industry"). Had Congress not made such provisions, vehicle makers could have taken exclusive control of virtually all future engine (and other) repairs simply by refusing to disclose electronic codes.

In all of these actions, Congress clearly recognized a potential for anticompetitive abuse that could not have been corrected by interbrand competition for vehicle sales.

Conclusion

The unique economics of durable goods makes tying arrangements in the markets for parts and service inherently suspect. Competition for new durable equipment sales cannot discipline prices in a tied market for sales and service. Comparative market shares in the tying equipment market are not a reliable indicator of the potential for significant harm in the tied markets for parts and service. No antitrust litigation should ever be decided on the basis of economic presumptions or models that contradict demonstrable economic realities clearly evident in analogous industrial history. The decision of the United States Court of Appeals for the Ninth Circuit should be upheld.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF COMPUTER SERVICE NETWORK INTERNATIONAL IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF COMPUTER SERVICE NETWORK INTERNATIONAL IN SUPPORT OF RESPONDENTS

I. INTEREST OF *AMICUS CURIAE*[1]

Computer Service Network International ("CSNI") is an organization of over 400 independent service organizations (*i.e.*, firms which service equipment they do not manufacture) servicing high-tech equipment ranging from computers to copiers and micrographic equipment to medical equipment. These organizations (hereafter

[1] Counsel of record have consented to the filing of this *amicus* brief and those letters have been filed with the Clerk pursuant to Supreme Court Rule 37.

"ISOs") account for over $1.5 billion in commerce and are located in 11 countries, primarily the United States. Some members are large companies (TRW, Bell Atlantic), and others are medium-sized and small businesses. The Association of Independent Medical Service Companies ("AIMS") has recently merged with CSNI. Its primary focus is servicing high-tech medical equipment.[2]

CSNI is a non-profit corporation incorporated in the District of Columbia; its purpose is to promote and maintain a closer union and organization of ISOs. Specifically, CSNI develops educational methods to increase awareness about ISOs and studies economic problems confronting the industry.

Each CSNI member offers its own brand of service. For example, each of the CSNI members which service IBM computers offers a different brand of service for IBM computers. These members participate in interbrand competition with each other and with IBM. Members which have the capabilities and parts to compete with IBM for service business do not, because of the uniqueness of those parts and capabilities, then have the capability to compete for the service business of companies which use a computer manufactured by a company other than IBM, for example, Data General or Hewlett-Packard.

Because copiers and micrographic equipment are high-tech equipment, just as computers are, the analysis is the same. Just as there are different brands of copiers and micrographic equipment, there are different brands

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[2] Membership lists of both CSNI and AIMS have been lodged with the Clerk and are tabbed "H."

of service for a particular copier, such as Kodak's. Copiers and micrographic equipment, like most high-tech equipment, have unique components and parts. One manufacturer's copier varies substantially from another manufacturer's copier. Thus, ISOs which service a particular brand of copier are not, by virtue of that fact, capable of servicing another manufacturer's copier.

Contrary to Kodak's assertions, this case does not concern interbrand competition for copiers and micrographic equipment. It concerns interbrand competition for the service of Kodak copiers and micrographic equipment. CSNI is submitting this brief as an *amicus curiae* because, if the Ninth Circuit's decision is reversed on market definition grounds, an entire industry will be destroyed. ISOs for high-technology equipment will cease to exist or will exist only at the sufferance of manufacturers. The end result will be that competition for service will be eliminated and consumers will have less choice and will pay higher prices.

Additionally, manufacturers' fears that ISOs will give their brand a bad name are unfounded at best. The marketplace will take care of firms that do not produce quality work by eliminating those firms from the market.

Finally, Kodak's doomsaying is without foundation. Not only has every other civilized country which has ruled on this matter adopted the same rule as the Ninth Circuit, but also the most successful computer company in history – IBM – has for over thirty-five years been required by its consent decree to provide spare parts to ISOs. *United States v. International Business Machines Corp.*, 1956 Trade Cas. (CCH) ¶ 68,245 (S.D.N.Y. Jan. 25, 1956).

II. SUMMARY OF ARGUMENT

If this Court gets past the procedural issues surrounding a grant of summary judgment when the record reveals many disputes of material fact and when plaintiffs were not allowed to develop their case, then market definition is the essence of this case. Kodak claims that the market this Court should be concerned with is that of copiers and micrographic equipment in general. The proper inquiry is whether service of Kodak copiers and micrographic equipment can constitute a relevant market. This Court since at least *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563 (1925) has held that such an inquiry is factual.

For this reason, the ISOs in this case should be allowed to present their claims to a jury. Two other courts have permitted the issue of market definition to go to the jury and these juries have come back in favor of the independent service firms. *HyPoint v. Hewlett-Packard*, No. C87-2484 (N.D. Ohio 1990); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, No. 89-CV-71762-DT (E.D. Mich. 1990). Appeals on both matters are pending before the Sixth Circuit.

Kodak claims that it is necessary to monopolize its parts in order to compete in the interbrand market for copiers and micrographic equipment, and that a relevant market for service of a manufacturer's system is too narrow a definition. Every other country or multinational organization that has considered these issues has come down on the side of ISOs and on the side of competition.

In the United States, manufacturers, including Kodak, used to provide ISOs with spare parts and other

goods and services on liberal terms. These practices fostered the development of ISOs. Now the manufacturers are trying to change a well-established pattern of distribution without a valid business justification.

III. ARGUMENT

A. History Of Independent Service Organizations

When manufacturers first started making high-tech equipment such as computers, copiers and micrographic equipment, they considered maintenance as a necessary but economically unimportant aspect of selling this equipment. They fostered growth of an independent repair and maintenance industry by providing the new service companies inexpensive or free services, such as training, expedited delivery of parts, and diagnostic software. In turn, the ISOs recommended the brand they serviced to their customers, which fostered brand loyalty.

Then the economics of the industry changed. The price of computers dropped, and the demand for high quality and reliable service rose sharply. Suddenly, more of the profits were in maintenance, and manufacturers sought to regain the market share they had fostered for the ISOs. By taking away the benefits they had provided, manufacturers succeeded in driving many ISOs out of business. It was only then that litigation on this issue developed.

In fact, the manner in which the ISOs flourished and then suffered is similar to *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585 (1985). In *Aspen Skiing*, the owner of three of four mountains in a destination ski resort cooperated for many years with the owner

of the other mountain in the area. *Id.* at 589. When the venture no longer suited its purposes, the three-mountain owner cut off its competitor. *Id.* at 594. This Court unanimously held that this conduct violated the antitrust laws. *Id.* at 611.

This Court recognized the well-established maxims that a business has the right to select its own customers and a competitor need not cooperate with other competitors. *Id.* at 600. This Court also acknowledged that those rights are not unqualified. *Id.* at 601. The Court stated: "[In *Aspen Skiing*], the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Id.* at 603.[3]

This same cooperation occurred not only between Kodak and the ISOs involved in this case, but also between many other manufacturers and the ISOs which serviced their high-tech equipment. Indeed, it was the manufacturers themselves which created the industry of ISOs which forms the basis of this trade association. As in

[3] The Court elaborated on this point by quoting from Robert Bork's book *The Antitrust Paradox*, 156: "In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs." *Id.* at 604, n.31.

Aspen Skiing, when it suited their interests, the manufacturers encouraged the growth of ISOs. The manufacturers should not now be permitted, after a certain "pattern of distribution" has developed, to abruptly alter the status quo.

B. Market Definition

Kodak claims that there is no market for the service of Kodak copiers and micrographic equipment; the *amici* supporting Kodak's position make a similar claim with regard to other high-tech equipment. However, the very existence of CSNI, which has over 400 ISOs as members, refutes this argument. There is a demonstrated demand by consumers for independent companies which service high-tech equipment. If such a demand were not present, those organizations would not have come into existence and prospered.

One point is irrefutable: ISOs by definition do not manufacture high-tech equipment and therefore do not compete in that interbrand product market. Consequently, they compete in the market for maintenance of high-tech equipment. The facts that ISOs exist, that they serve consumer needs, and that they must overcome substantial barriers to entry illustrate that there is a market for the maintenance of high-tech equipment.

Barriers to entry – for example substantial investment in training and inventory – exist with respect to each manufacturers' brand of high-tech equipment. This fact illustrates that there is no reasonable interchangeability between service of different manufacturers' high-tech equipment. If your Kodak copier is broken, it does you no good to call Xerox or Canon.

Therefore, the service markets are limited by each manufacturer's brand. Within that brand of equipment, there are numerous brands of service of that equipment.

Kodak controls the supply of spare parts for its equipment. The incentive for independent suppliers of spare parts to arise in this market is dampened by high technological barriers and the frequency of product change in the high-tech industry. By the time a potential alternate supplier spent the resources to overcome the technological barriers to entry, it is likely that the next generation of equipment will have come into existence. The parts distributed by the alternate supplier may no longer be relevant to the new generation of product.

1. The relevant market defined in this case is evidenced by the existence of forcing.

This Court set forth tests for market definition in *United States v. E.I. duPont de Nemours & Company*, 351 U.S. 377 (1956) and *Brown Shoe Company v. United States*, 370 U.S. 294 (1962). The *duPont* Court held that "the relevant market depends upon the availability . . . of alternative commodities for buyers: i.e., whether there is a cross-elasticity of demand. . . ." *duPont*, 351 U.S. at 380. Cross-elasticity of demand expresses how price movement in one market affects demand for goods or services in other markets. Where products are similar and the price of one product increases sharply, consumers will substitute other products. Because a particular manufacturer's copier needs unique parts and requires unique knowledge to repair, it is not possible for consumers to switch to a maintenance firm which services another

manufacturer's copier. Thus, the plaintiffs in this case meet the *duPont* test because consumers requiring maintenance of Kodak copiers and micrographic equipment are not able to turn to organizations which service other manufacturers' products.[4]

Additionally, there is a practical point with respect to market definition. When forcing exists, it follows that reasonably interchangeable substitutes do not exist and, therefore, that there is a market for that particular service or product. It is simple logic that it would not be possible for a manufacturer to force a consumer to use that manufacturer for service if there were substitutes available.

In this case, by severely limiting access to its parts, Kodak is essentially forcing end users to choose Kodak for maintenance. Without access to parts, ISOs are unable to perform maintenance on Kodak copiers and micrographic equipment.[5] As a result, customers are left to choose only Kodak for service.

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[4] This court has also examined "practical indicia" to define the relevant product market. *Brown Shoe*, 370 U.S. at 325. Those practical indicia include "industry or public recognition of the submarket . . . the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors." *Id.* In this case, there was no economist, so there was no development of that part of the record. These factors were, however, discussed in an affidavit filed by Professor Mackie-Mason in the *Virtual* case at ¶ 60. This Court may take judicial notice of this court filing, *United States v. Author Services, Inc.*, 864 F.2d 1520, 1523 (9th Cir. 1986), which, for the convenience of the Court, is lodged with the Clerk's office, and tabbed "A."

[5] Why alternate suppliers of parts do not have the incentive to overcome the substantial technological entry barrier in a

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Cases with fully developed records also show ample evidence of forcing. Transcript excerpts and evidence from the *HyPoint* and *Virtual* cases, *supra* at 4, of which this Court may take judicial notice, have been lodged with the Clerk's office, and tabbed "B" and "C."

For example, one customer in the *HyPoint* case testified as follows: "We were being forced to go back to Hewlett-Packard." An example of testimony from a forced customer in the *Virtual* case illustrates this same point. The president of a Prime customer who wanted to go with Virtual for their maintenance contract testified that because of Prime's policy it was not possible to choose Virtual.

> Q. Was your company attracted to the idea of using Virtual for maintenance?
>
> A. Yes.
>
> Q. Why was that?
>
> A. . . . maybe three years ago now . . . Prime entered into the business of servicing the Lundy terminals, which is a part of the PDGS system. As soon as that happened, our monthly hardware maintenance fee from Lundy went from $500 a month to $200 a month per terminal. That was the . . . effect of competition in the marketplace. So we were, and remain, eager for that competition to exist. . . .

See also Section D.2, *infra* at 17.

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high-tech industry is analyzed at ¶¶ 34-35 of the affidavit cited in footnote 3 above.

2. The marketplace, not the manufacturers, should determine which companies compete in the market for maintenance.

Kodak's chief argument is that this Court should examine the fiercely competitive market for copiers and micrographic equipment in general and determine that competition should allow Kodak effectively to keep ISOs from servicing Kodak equipment. Kodak talks of "finger pointing" and potential problems with customer loyalty if an ISO makes an error in diagnosing or fixing a problem with a copier. However, the antitrust laws tell us that it is the market, and not Kodak or another manufacturer, which should determine who competes.

In *National Society of Professional Engineers v. United States*, 435 U.S. 680 (1978), this Court discussed this concept. While *Professional Engineers* was a price fixing case, the reasoning behind the opinion applies here. In *Professional Engineers*, an association of engineers entered into an agreement whereby none of the engineers would provide customers with prices until the customer had chosen which engineer would perform the job. The Association's rationale behind this prohibition was that price competition would force engineers to cut corners in order to get customers. This cost cutting in turn would adversely affect the public health, safety and welfare. *Professional Engineers*, 435 U.S. at 685-86.

This Court agreed with the District Court, which held that such an arrangement "impedes the ordinary give and take of the market place." *Id.* at 692. While this Court agreed with the association that there was some risk that competition would cause some suppliers to make inferior

products to keep their costs down, this Court found that "[t]he Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Id.* at 695.

The Court continued: "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just cost, are favorably affected by the free opportunity to select among alternative offers." *Id.*

Even if projects were being engineered which could potentially harm the consumer, this Court reasoned that the Sherman Act did not differentiate between cases that affected public safety and those that did not. Competition would make those determinations, not the Court: "The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on manufacturers." *Id.* at 695-96.

The reasoning behind this Court's opinion in *Professional Engineers* applies in this case. The purpose of the Sherman Act is to promote competition. It is not concerned with individual concerns or needs, but with the needs of consumers as a whole. Thus, Kodak's argument that it needs vertical integration in order to benefit consumers and keep the integrity of its brand is specious.[6]

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[6] Kodak's main argument in favor of reversing the Ninth Circuit's decision is that it is economically unreasonable for a manufacturer to be required to sell parts to ISOs. Kodak claims that if the Ninth Circuit's decision stands, it will suffer great economic hardship as a result. This claim is completely undermined by the fact that the United States and IBM entered into a

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Kodak's position is equivalent to holding that Kodak needs to monopolize one market in order to compete in another. According to this Court, however, competition, not competitors, is the force that should affect quality, service, safety, durability and cost.

3. Competition among businesses that service Kodak copiers and micrographic equipment is interbrand competition as defined by this Court.

This Court defined interbrand and intrabrand competition in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977): "Interbrand competition is the competition among the manufacturers of the same generic product. . . . In contrast, intrabrand competition is the competition between the distributors . . . of the product of a particular manufacturer."

Under this definition, the competition among companies that service Kodak copiers and micrographic equipment is interbrand competition. The "generic product" is service of Kodak copiers and micrographic equipment. Each ISO that services Kodak copiers and

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consent decree in 1956, over thirty-five years ago, whereby IBM agreed, among other things, to sell spare parts to organizations which serviced IBM equipment. *United States v. International Business Machines Corp.*, 1956 Trade Cas. (CCH) ¶ 68,245 (S.D.N.Y. Jan. 25, 1956). If Kodak's assertions and predictions were correct, IBM should have been out of business long ago rather than being one of the most successful computer company in history.

micrographic equipment has its own brand of service. For example, companies may offer customers different price schedules or different methods of repairing copiers and micrographic equipment. The interbrand market is limited to the service of a single manufacturer's product by virtue of the technical differences in those products. Each manufacturer's copier requires unique parts and training for the copier's repair. Those parts and that training are not reasonably interchangeable with the parts and training needed for the repair of a copier made by another manufacturer.

The competition that exists among companies that service Kodak copiers and micrographic equipment is clearly not, under this Court's definition, intrabrand competition. For example, this case does not involve competition among dealers of a particular manufacturer's product. What ISOs sell is not the manufacturer's product; they sell the service of that product.

Companies that service Kodak copiers and micrographic equipment are not in a similar position to the distributors of Sylvania television sets in *GTE Sylvania*. Those distributors dealt with selling Sylvania television sets as Sylvania produced them. Thus, they were competing against other distributors which sold the exact same product. Here, however, the ISOs which service Kodak copiers and micrographic equipment have their own brand of service, and do not sell a Kodak product.

Image Technical Services sells the Image Technical brand of service, not the Kodak brand of service. By the same token, Joe's Auto Repair, which services Chevrolets, sells the Joe brand of service, not the Chevrolet brand.

C. The Ninth Circuit's Decision Does Not Contravene *Matsushita*

Contrary to Kodak's assertion, the ISOs' antitrust claims are not implausible, and therefore pass the test set out by this Court in *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986). Confirming the plausibility of these claims are two cases with fully-developed records. As mentioned *supra* at 4, an ISO obtained a verdict for $1.5 million in a monopolization case against Hewlett-Packard. *See* Judgment in *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, Case No. C87-2484 (N.D. Ohio 1990) (appeal pending) and tabbed "D." Another independent service firm won $25.3 million in a tying case against Prime Computer. *See* Judgment and Injunction in *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, Case No. 89-CV-71762-DT (E.D. Mich. 1990) (appeal pending) and tabbed "E." This Court may take judicial notice of these filings.

The litigation in *Matsushita* lasted for twelve years and the record was replete with evidence, albeit insufficient to establish an antitrust violation. Having had "several years of detailed discovery," *Matsushita*, 475 U.S. at 578, the plaintiffs had ample time to develop their record. In contrast, the District Judge in the case at bar severely restricted discovery, and there has been no expert economic testimony on market definition and possible market imperfections. Therefore, there is no basis for Kodak to argue that plaintiffs' theories make no economic sense.

As evidenced by the judgments in the cases above, plaintiffs' theories have already been proven in similar cases. In the *Virtual* case, an expert economist testified

extensively on market definition. *See* Affidavit of Jeffrey Mackie-Mason, *supra* at n.4, and tabbed "A." The opinions expressed in that affidavit were accepted by the judge and the jury, who obviously felt that these opinions made more economic sense than those proffered by the manufacturer.

Kodak assumes that anyone who wants to buy a copier has perfect information about all the contingencies, such as the life of the copier and the cost of maintenance. Kodak also assumes that a customer looks at all copiers and micrographic equipment before deciding which one to purchase. It is equally, if not more possible, that a customer will consider buying a Kodak copier only for a specific reason, or that information about lifetime costs of copier maintenance is imperfect, or that in a large organization the purchasers of equipment and service are different and have different objectives. These are the types of market imperfections to which the Ninth Circuit referred. By definition, market imperfections are questions of fact.

D. The Effects On Competition Will Be Far-reaching If The Ninth Circuit Is Reversed

1. Competitors will go out of business.

If manufacturers are permitted to maintain their control of the parts necessary to service their equipment, the result will be that hundreds of ISOs, which came into existence based on the availability of those parts, will be driven out of business. By denying ISOs access to parts, manufacturers effectively reserve the market of maintenance of their systems to themselves. Without parts it is

impossible for ISOs to service equipment. Because parts are unique to a particular machine, manufacturers are usually the only source of those parts.

2. Customers will suffer because of fewer choices and higher cost.

The result of the manufacturers' stronghold on their parts will be that customers will be severely limited in their choice of a maintenance firm. *See* B.1, *supra* at 8. In fact, if the manufacturers deny ISOs access to parts, a customer will have no choice but to turn to the manufacturer for maintenance. Manufacturers generally charge 25-30% more than ISOs.

An *amicus* brief filed by the Attorney General's office for the State of North Carolina on behalf of a state hospital in a recent case in North Carolina District Court illustrates the fact that customers benefit from and are in need of competition in the market for maintenance of high-tech equipment. *General Electric Co. v. Thomas J. Zuchowski* and *General Electric Co. v. R. Squared Scan Systems, Inc.*, (M.D.N.C. Case Nos. C-87-59-WS and C-87-249-WS). The *amicus* brief ("Brief") is lodged with the Clerk, and tabbed "F."

General Electric manufactures a high-tech medical machine called a CT scanner which is used in hospitals nationwide. Like other manufacturers attempting to maintain a hold on maintenance of its equipment, GE restricted access to its diagnostic software and manuals. This restriction forced customers to choose GE for maintenance. Without access to the manuals, ISOs were unable to repair the machines adequately; thus they were squeezed out of the market by GE's practices.

The North Carolina Memorial Hospital, a state hospital, which purchased a CT scanner from General Electric, took the position that it would be harmed if GE were permitted to restrict access to the necessary tools to maintain the CT scanner. The *amicus* brief filed for the hospital illustrates the severe problems faced by customers of a manufacturer's equipment who are left without choice of a maintainer.

The hospital did not believe there was any legitimate reason why it should have to choose GE in order to obtain sufficient maintenance coverage: "Why should the owner of any CT scanner be forced to choose between contracting for service on the CT scanner (1) with a company that may or may not have sufficient diagnostic software and service materials, or (2) with GE to assure itself of access to the sufficient software and manuals?" Brief at 1-2.

According to the hospital, "[a] lack of competition in service will directly and adversely affect the cost and quality of health care." *Id.* at 2. The hospital recognized that "[w]ithout effective competition, it appears to [the hospital] that GE has no incentive to provide the best service at a reasonable cost, and health care providers and the public suffer the consequences." *Id.* at 4.

GE made some of the same arguments for vertical integration as Kodak does. The hospital concluded that these arguments were pretextual or irrelevant. Like Kodak, GE argued that it was necessary to retain control of the diagnostic manuals in order to insure better service for the customer. However, the customer, in this case the hospital, had a completely different view of the situation.

The hospital stated in its brief that the growth of ISOs which service the scanner had actually "resulted in better service being available at a lower cost. Because other manufacturers of CT scanners do not service GE or Technicare CT scanners, independent service organizations provide *the only competition* for GE in the area of service." *Id.* at 5. Thus, according to the customer, they received better quality service as a result of the ISOs' presence in the market.

Additionally, the argument that manufacturer control is necessary to maintain quality, prevent "finger pointing," and compete in the market for the high-tech equipment is unfounded. According to the hospital, it was not until the hospital became interested in contracting with an ISO that GE changed its practices and limited access to its diagnostic software and service manuals. *Id.* at 3. Thus, it was apparently not necessary for GE to compete in the market for scanners that it maintain control over its manuals and software.

VA hospitals have recently made the same point as North Carolina Memorial. The Office of the Inspector General of the Department of Veterans Affairs, after a congressional inquiry, investigated bidding procedures for service contracts of medical equipment (specifically CT scanners) within the Department of Veterans Affairs. The Inspector General prepared a report which recently became available under the Freedom of Information Act. 5 U.S.C. § 552 (1986). This Court may take judicial notice of that report, which is lodged with the Clerk and tabbed "G."

Several Veterans Affairs Medical Centers (VAMCs) purchased a CT scanner manufactured by a company called Picker. Several of the contracts awarded to Picker contained restrictions which required that tubes needed to service the scanners be purchased only from a company which Picker owned. There were other restrictions which required that service technicians be trained by Picker, and that Picker diagnostic software be used. The Inspector General found that "[t]hese specifications . . . were considered restrictive since only the original equipment manufacturer could meet the performance criteria contained in the specifications." Report at 4.

The Inspector General found that two types of tubes were compatible with the Picker CT scanner. Picker attempted to justify its requirement that only their company's tubes be used to service the machines by claiming that the other tubes were unsafe and could damage the machines. After extensive research, the Inspector General "found no factual basis for Picker alluding to a lack of safety or performance of [the other] tube." *Id.* at 5. The same was true of the restrictive specifications regarding software which required the contractors to obtain a license before using the diagnostic software. *Id.*

The Inspector General recommended that the VAMCs prepare contracts themselves that did not contain restrictive terms. He stated that this would "increase competition by allowing all qualified sources to compete for a contract award." *Id.* at 6.

E. Courts Of Other Countries And Multinational Organizations Which Have Considered This Issue Have Decided In The Same Way As The Ninth Circuit

Kodak and the *amici* supporting its position, particularly the Computer Business Equipment Manufacturer's Association, claim that vertical integration is necessary in order for manufacturers to compete not only against each other but against companies from other countries. This argument is misleading: every foreign jurisdiction which has considered this issue, including Canada, Japan, and the European Court of Justice, has ruled similarly to the Ninth Circuit. Thus, companies from other countries are not free to curtail access to their parts. It follows that Kodak and other manufacturers in the United States will not be disadvantaged when competing against other countries.

1. The Canadian Competition Tribunal entered a mandatory injunction requiring Xerox to sell parts to an ISO.

In a case with strikingly similar facts, the Canadian Competition Tribunal held that parts for Xerox copiers and micrographic equipment constituted a relevant market for antitrust purposes and required Xerox to sell parts to an ISO. *Canada (The Director of Investigation and Research) v. Xerox Canada, Inc.*, (1990) 33 Can. Pat. Rep. 83 (Competition Tribunal).

As Kodak did in this case, for some time Xerox sold parts for its copiers and micrographic equipment with no restrictions. After Xerox in the United States determined that the revenues from the services of their copiers and

micrographic equipment was being lost to ISOs, it instituted a policy limiting access to parts. *Id.* at 5. Xerox Canada shortly followed suit. According to the Competition Tribunal, "[t]his was done in order to eliminate competition from organizations which had grown up and were providing maintenance service for Xerox photocopiers." *Id.* The Tribunal also found that "[t]he curtailment of the supply will also effectively eliminate most of the second-hand market in Xerox copiers. . . . " *Id.*

Exdos, an ISO, competed with Xerox for customers who needed service of Xerox copiers and micrographic equipment. The Tribunal found that "[e]vidence. . . . makes it clear that the second-hand copier market and the option for an alternate source of service provided by ISOs are beneficial to consumers. They allow for customer choice which would not otherwise be available." *Id.* at 18. The Tribunal also found that the service provided by Exdos and other ISOs was "comparable to that provided by Xerox, and on occasion better and at a lower price." *Id.*

After the ISOs began to succeed, Xerox introduced a policy in the United States, which was shortly followed by Xerox Canada, that Xerox would limit purchasing of its parts to end users. This policy "was clearly designed to undercut the viability of the ISOs and to preserve, if not enhance, the revenue derived by Xerox Corp. from the service aspect of its business." *Id.* at 25.[7]

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[7] The Tribunal, like the European Court of Justice, found that as a practical matter Exdos could only obtain parts from Xerox. *Id.* at 32. Cannibalization of machines, the Tribunal held, was "not an adequate source of supply over the long run." *Id.*

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As is the case here and in the EEC case cited in Section E.2, *infra* at 25, Xerox argued that the relevant market was the market for copiers and micrographic equipment while the Director argued that the relevant market was Xerox copier parts, particularly post-1983 Xerox parts. *Id.* at 35. Using factors similar to those used by this Court in *Brown Shoe*[8] and citing *Image Technical Services* and the EEC case discussed in Section E.2, *infra*, the Tribunal agreed with the Director. *Id.* at 52. This Court should reach the same conclusion.

Although the Tribunal acknowledged Xerox's argument that it needed to curtail supply of its parts in order to compete in the copier market, the Tribunal did not agree with that argument. *Id.* at 43. The Tribunal found that "even if Xerox were forced to price parts competitively in the long run, a present owner of a Xerox machine cannot easily, during the economic life of that

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Because some parts are used much more frequently than others, ISOs relying on "cannibalization" would find themselves with too few of some parts and too many of others. *Id.* In addition, other sources of Xerox parts are insufficient because they do not manufacture *all* parts needed to service Xerox equipment. *Id.* at 33.

[8] The factors included: actual and practical competition, integration and stages of manufacturers, method of production or origin, physical characteristics of products or services, end users of products, product substitutability, geographic area, and relative prices of goods or services. *Id.* at 42.

machine, switch to another manufacturer's brand of copier." *Id.* at 44.[9]

The Tribunal also did not accept Xerox's claim that it needed to control its parts supply because of the danger that dissatisfied customers of ISOs would blame Xerox. The Tribunal stated that "[i]n fact, it might be argued that Exdos, perhaps more than Xerox, has an *immediate* interest in providing timely, high-quality service and repairs since that is its business." *Id.* at 55-6.

The Tribunal held that Xerox itself created a market for Xerox copier parts "by selling to anyone who wished to purchase," *id.* at 64, and that section 75 [of Canada's competition law] was violated by Xerox's refusal to supply parts to ISOs. *Id.* at 81. Accordingly, the Tribunal entered an order requiring Xerox to sell parts to Exdos. *Id.*

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[9] The Tribunal continued: "it is no answer to Exdos' customers to tell them that 'based on some Chicago School of Economics theory . . . [they] should wait until the market rights itself' and that in the long term when they purchase their next copier they can purchase from a company that provides better and cheaper parts and service." *Id.* This type of analysis is similar to what this Court stated in *Aspen Skiing*: " . . . Ski Co. was not motivated by efficiency concerns and . . . it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Aspen Skiing*, 585 U.S. at 610-611.

2. The European Court of Justice determined that the relevant market for antitrust purposes was parts and service of a particular manufacturer's cash register.

Long before this became an issue in the United States, the European Court of Justice considered whether service of a particular manufacturer's product could constitute a relevant market. The Court found that a manufacturer which was essentially the only source of production of spare parts for its machines occupies a "dominant position" (similar to a monopoly under U.S. antitrust laws) in the market for those spare parts. *Hugin Kassaregister AB and Hugin Cash Register Ltd. v. E.C. Commission*, 1979 E. Comm. Ct. J. Rep. 1869, (Court of Justice, Case 22/78, May 31, 1979) 3 Comm. Mkt. L. R. 345. The court refused to accept the defendant's proffered business justification that it needed to monopolize parts and after-sales service in order to maintain or enhance its position in the market for cash registers.[10]

Hugin was a company which manufactured cash registers with a 13% market share within the United Kingdom. *Hugin*, 3 Comm. Mkt. L. R. at 348. Hugin's policy was to allow only approved Hugin technicians to service Hugin cash registers; "thus independent maintenance and repair undertakings [were] excluded from this field of activity." *Id.* Liptons was to be an authorized dealer

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[10] The Court of Justice annulled the decision of the Commission on the ground that Hugin's actions only affected trade within the United Kingdom, and did not affect trade between member states, a requirement of Article 86. *Hugin*, 3 Comm. Mkt. L. R. at 368.

and repair organization for Hugin in the United Kingdom. During contract negotiations Hugin supplied Liptons with both cash registers and spare parts. However, a problem developed in their business relations and Hugin refused to supply spare parts to Liptons which caused Liptons to bring suit against Hugin. *Id.* at 349.

The claims of the parties were similar to those in this case. Liptons claimed that because other manufacturer's spare parts could not be used to repair Hugin cash registers, and that Hugin was the sole source of production, Hugin had an "absolute monopoly" over its spare parts. *Id.* at 350. Liptons also alleged that Hugin had a "dominant position" in after-sales service for its machines. *Id.* Hugin, like Kodak and the *amici* supporting Kodak's position, argued that such market definitions were too narrow. Hugin claimed that competition among cash register manufacturers was "extremely fierce" and the relevant market was for all cash registers, not Hugin parts or service of Hugin cash registers. *Id.*

Hugin, like Kodak, claimed that it had no power to control prices of its spare parts because it would risk losing customers to other manufacturers and thus could not have market power. The Court found that "it can certainly be accepted that such factors do indeed prevent *excessive* prices being fixed for spare parts. I do believe, however, that at the same time there remains scope for independent conduct within the meaning of Article 86 of the EEC Treaty at least to a certain extent." *Id.* at 354. The Court found that the value of spare parts in relation to the price of each cash register was relatively small (3%). The same was true of service in relation to cash registers. "In view of that situation it can certainly be assumed that

even relatively substantial increases in the price of spare parts are possible without affecting the customer's choice of a make of cash register." *Id.*

The independent companies were "more dependent on Hugin . . . than normal cash register customers with regard to Hugin spare parts. For the [independent companies] it is not so simple . . . to switch to other makes in reaction against excessive prices for spare parts." *Id.* at 355. The Court held, in essence, that the independent companies were at the mercy of Hugin because of the uniqueness of Hugin spare parts.

The Court concluded that "Hugin is clearly able, without running the risk of an unfavorable reaction from its ordinary cash register customers, to pursue a policy in connection with its spare parts which eliminates independent maintenance companies from competition in the field of Hugin machines." *Id.* at 356.

The Court also considered Hugin's argument, which was virtually identical to Kodak's, that monopolizing after-sales service is justified because it allows for increased competition in the market for cash registers which in turn benefits consumers. The Court found that if Hugin's position were adopted, it would amount to "the complete elimination of independent maintenance undertakings and thus a fundamental alteration of the structure of competition." *Id.* at 360.[11] The same is true here.

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[11] In *Volvo A.B. v. Erik Veng*, 4 Comm. Mkt. L. R. 122 (1988), the European Court of Justice reached a similar conclusion. In that case, the court defined the relevant market as body panels

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3. A Japanese Court has recently reached a similar conclusion on this issue.

The Osaka District Court recently held that a manufacturer of parts was required to sell those parts to independent service organizations. *K.K. Tsutsuki Kanteisho v. Toshiba Shokoki Saabisu K.K.*, 1365 Hanji 91 (October 30, 1990) (Osaka Dist. Ct. Nos. Showa 60 [1980] (WA) 2665 and 2666). Toshiba Elevator, which serviced elevators manufactured by Toshiba, adopted a policy of refusing to sell Toshiba parts and components necessary to service Toshiba elevators to ISOs which also serviced Toshiba Elevators.

In that case, the owner of a Toshiba elevator contracted with an independent service organization. When that company needed parts to repair the elevator, Toshiba Elevator refused to supply the parts. Toshiba Elevator maintained that it was necessary to limit access to parts for safety reasons. The Osaka District Court rejected this reasoning, stating that the term "unreasonable" as used

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manufactured by Volvo: "The fact nevertheless remains that the owner of a vehicle who, at a given moment, decides to repair the bodywork of his vehicle rather than change model is obliged to purchase (either directly, if he repairs the car himself, or indirectly through a garage in the manufacturer's network or through an independent repairer) a body panel which is identical in shape to the original part. Consequently, for the owners of a vehicle of a particular make the 'relevant market' is the market made up of the body panels sold by the manufacturer of the vehicle and of the components which, being copies, are capable of being substituted for them."

in Article 2(9)(vi) of the AML [Antimonopoly Law] and Item 15 of the Designation [by Japan's Fair Trade Commission] should be judged solely from the standpoint of maintaining competition. The Court held that whether or not the safety of elevators was jeopardized by the defendant's selling only parts and components to [plaintiffs] was a consideration which was not directly related to the maintenance of competition and should not be taken into account when judging on the issue of "unreasonableness."

The Toshiba Elevator case follows *Wakodo K.K. v. Kosei Torihiki Iinkai [Fair Trade Commission]*, 781 Hanji 21 (July 10, 1975) (S. Ct. 1st Petit Bench No. Showa 46 [1971] (TSU) 82), which held that in cases in which the conduct in question seems justifiable, that is, a usefulness or necessity from a business management viewpoint which has no direct relationship with the competition order, a justifiable reason cannot be recognized.

IV. CONCLUSION

The way for Kodak to sell more service is to sell the best at the lowest price, just as IBM has been doing since its consent decree in 1956. It is not necessary to revise our antitrust laws to help Kodak compete against other countries, because they are subject to the same rules.

Most importantly, it is unnecessary and undesirable to change the long-standing rule that market definition is a factual inquiry. When such an inquiry is made, it is

obvious that there are service markets for high-technology products of a single manufacturer. If there were not, the organization filing this brief would not exist.

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In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC. *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF STATE PURCHASING OFFICIALS AND NATIONAL INSTITUTE OF GOVERNMENTAL PURCHASING, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

The National Association of State Purchasing Officials and the National Institute of Governmental Purchasing, Inc. file this brief as amici curiae in support of Respondents, Image Technical Services, Inc., *et al.*

The National Association of State Purchasing Officials ("NASPO") is a non-profit affiliate of the Council of State Governments. NASPO is comprised of the heads of the purchasing agencies of all fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

The National Institute of Governmental Purchasing, Inc. ("NIGP") is a non-profit educational and technical organization of State and local governmental buying agencies. The members of NIGP include over 1,300 governmental purchasing agencies of the United States, the fifty States, the Provinces of Canada, and many county, city and municipal governments.

The members of NASPO and NIGP purchase a combined total of about $550 billion in goods and services annually on behalf of State and local taxpayers. State governments alone purchase more than $200 billion annually. These purchases include Kodak photo-copiers and micrographic equipment, and related purchases of supplies, replacement parts and repair services for those machines.

This case arises under the Sherman Act, 15 USC § 1 *et seq.* (1982), intended by Congress to encourage competition and protect the interests of consumers. *See NCAA v. Board of Regents*, 468 U.S. 65, 107 (1984). NASPO and NIGP have strong interests in promoting competition among suppliers of goods and services to governmental consumers. The members of both organizations seek to obtain the best quality product, at the lowest price, for the taxpayers. "More value for the tax dollar" is NIGP's informal motto.

The goals of NASPO and NIGP are firmly embedded in established public policy. Virtually every State and local government in the United States is required, by law, to use competitive processes to purchase goods and services. *See e.g.*, Alaska Stat. 36.30.100 (. . . unless specifically exempted by law, an agency contract shall be awarded by competitive sealed bidding"). Long experience has shown that vigorous competition among multiple suppliers is essential to obtaining the best product while protecting the public fisc.

The members of NASPO and NIGP are in a unique position to address the practical effects of the issues raised in this case.

SUMMARY OF ARGUMENT

Governments routinely buy expensive pieces of micrographic and photocopier equipment, including Kodak's machines. This equipment must be maintained

and serviced on a regular basis. Without constant attention from skilled technicians, much of today's "high tech" equipment will not function for very long – if at all.

Public agencies are easily locked-in by budget constraints to a particular type of equipment. There are legal constraints on public purchasers which make total cost pricing of equipment difficult. Vigorous competition among multiple service providers is essential for the members of NASPO and NIGP to obtain the "most value for the tax dollar."

Monopolization of aftermarket for parts, and the consequent elimination of competition in the aftermarket for service, is injurious to the public fisc. Tying sales of parts to service leaves the equipment manufacturer free to charge the public agency higher prices for less service than could be obtained in a competitive market.

The factual record in this case is almost nonexistent. The Court of Appeals correctly held that remand was appropriate.

ARGUMENT

THE ISSUE OF MARKET POWER IN AFTERMARKETS IS A FACT QUESTION THAT CANNOT BE RESOLVED ON THIS RECORD BY A "PER SE" RULE OF COMPETITIVENESS

The issue of Kodak's market power is central to the correct resolution of this case. Respondents' tying claims require a showing of "some special ability – usually

called 'market power' – to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 (1984). Similarly, respondents' claims of monopolization require proof that Kodak enjoyed the "power to control prices or exclude competition in the relevant market." *United States v. E.I. DuPont deNemours & Co.*, 351 U.S. 377, 391 (1956).

Kodak argues that a manufacturer that lacks market power in the "interbrand" original equipment market cannot, as a matter of law, wield market power in the aftermarkets for parts and repair services. *See* Petitioner's Br., 16-27. In an area of particular interest to NASPO and NIGP, Kodak argues that it cannot succeed in overcharging its customers in these aftermarkets: "[a] lock-in strategy works only if Kodak can make more total profit by overcharging its existing customers for service than it will lose as its new and repeat product sales dry up." Petitioner's Br. at 25.

Given the constraints on public purchasing agencies, the members of NASPO and NIGP believe that an equipment manufacturer with market power in the aftermarkets is quite able to make a "lock-in strategy" work in the public sector, regardless of whether the manufacturer has market power in the interbrand equipment market. This is precisely the sort of "market imperfection" the Court of Appeals held can "keep economic theories about how consumers will act from mirroring reality." *Image Technical Services, Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 617 (9th Cir. 1990).

A.

Governments Are Major Purchasers of Photocopiers and Micrographic Equipment.

State, county and local governments are among the nation's largest purchasers of copiers and micrographic equipment. This equipment is necessary to perform essential governmental services at a manageable cost. Court records in the State of Alaska, for example, are transferred to microfiche for permanent storage and easy retrieval. Land records, once kept in rows and rows of dusty books, are maintained in easily accessed microfiche files. With the assistance of computers, these records can be searched quickly, accurately and inexpensively by the public.

Similarly, photocopiers (low, medium, and high volume) are fixtures in virtually every State and local governmental office in the nation. It may well be, as some say, that the invention of the photocopier was the greatest advance in printing since moveable type. Combined with the desktop publishing capacities of personal computers, photocopiers have become essential in government operations.

B.

A Competitive Service Aftermarket Provides the Best Value.

Micrographic equipment and photocopiers are expensive to buy and to operate. The initial capital outlay is substantial, not only for the machines themselves but for their associated "systems" – data retrieval software,

for example, and employee training. To amortize the cost of these expensive machines at an affordable level, State and local governments need to keep them in operation for as long as possible. As the District Court observed, "customers who have purchased Kodak equipment in a competitive market will tend to retain that equipment for its economic life." Pet. App. 34B. Put another way, once the equipment purchase is made, the public agency is "on the hook" for parts and service until the equipment wears out.

Where can the governmental agency turn for parts and service? Its interest is in obtaining the best value for the least cost to the taxpayer. This combination is not always found in the cumbersome bureaucracies of equipment manufacturers like Kodak. In response to demand for better (and cheaper) service than that provided by manufacturers, independent service organizations have sprung up to provide specialized and aggressive service for the owners of many types of equipment, including copiers and micrographic equipment. *See, e.g.*, JA 420, 425-27, 474-75 and 482-84.

An independent service organization may not be able to manufacture a microfiche machine, but it is likely to do a quicker, cheaper and often better job of servicing that machine than the original manufacturer.[1] The members

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[1] The Court of Appeals accurately found that evidence in the record of Kodak's own conduct suggests that "the demand for parts can be separated from the demand for service." 903 F.2d at 616. In the view of the more than 1,300 public purchasing agencies which make up NASPO and NIGP, this conclusion

(Continued on following page)

of NASPO and NIGP have found that a competitive environment, where independent service organizations compete fiercely among themselves and with manufacturers, results in lower prices and better customer service. The challenge from independent organizations sharpens the manufacturers' response to its customer's problems; the smaller, more flexible independent organizations adapt quickly to new market needs. The record confirms the experience of NASPO and NIGP members. *See, e.g.*, JA 420 ¶ 30, JA 424-35 ¶¶ 42-47, JA 451 ¶ 5 *and* JA 536 ¶¶ 5-7.

To effectively compete, these independent service entrepreneurs need parts. As any owner of a photocopier can aver, high technology equipment needs maintenance and repair ceaselessly – and virtually every service call requires parts. By exploiting its control over parts, and starving the independent service organizations, a manufacturer can force the public agency to buy service from it: "a tied product that the buyer . . . might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp.*, 466 U.S. at 12.

C.

Procurement Rules Result in Market Imperfections.

Kodak argues that an equipment manufacturer which uses this power to overcharge its customers will soon

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(Continued from previous page)

is correct. The development and early success of Respondents' businesses is additional evidence from which it may be inferred that parts and service are separate markets in the photocopier and micrographic industries. Fed. R. Civ. Pro. 56.

find its sales of new equipment declining. Petitioner's Br. at 26. Thus, it argues, overcharging in the aftermarkets is an "implausible strategy," or in Judge Posner's pithy phrase, "a short-run game." *Id., citing Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988) (Posner, J., dissenting). Kodak's economic theory is largely irrelevant to the real world of public purchasing.

Government agencies face restrictions not found in the private sector. One of these is the requirement of competitive bidding. As a matter of public policy, State and local governments almost uniformly use competitive bidding to obtain the lowest price. Where more than one supplier exists (*i.e.*, where there is "interbrand" competition), most public agencies are required by law to buy equipment from the lowest bidder. *See, e.g.*, Alaska Stat. 36.30.170(a) ("the procurement officer shall award a contract . . . to the lowest responsible and responsive bidder"). A rational bidder can "low-ball" the price for its equipment, and make up for lost profits by higher service costs once the agency is locked-in.

To avoid this, Kodak argues, the consumer will "consider" service costs at the time of purchase. The type of analysis required by Kodak's economic theory – estimating the total (or "life-cycle") cost of a given piece of equipment – is notoriously difficult and imprecise. This is particularly the case for high technology, where there may not be enough data to estimate the cost of maintaining newly developed equipment over the term of its

useful life. Long term service contracts covering the useful life of new equipment, at a fixed cost, are generally not available at the time of purchase.

Consequently, Kodak's approach to purchasing is disfavored by State and local governments. In the State of Alaska, for example, life-cycle costing is only allowed upon a special showing:

> A contract based on total or life cycle costs may be awarded only when the chief procurement officer or, for construction contracts or procurement for the state equipment fleet, the commissioner of transportation and public facilities, determines in writing at the time of the contract solicitation that the contract promotes overall economy for the purposes intended, encourages competition, is not unduly restrictive, and is in the best interests of the state.

Alaska Stat. 36.30.150(b).

It takes a courageous purchasing officer to certify that all these factors are present on a bid for untested equipment. Government officials know they are not omniscient in purchasing decisions. The public interest and closely drawn procurement regulations demand that they err on the side of caution. This generally means taking vendors' claims with the proverbial grain of salt, and relying on empirically verifiable specifications rather than the rosy projections of an eager salesman. The "perfectly omniscient consumer," as posited by Kodak, does not exist in the public purchasing sector.

D.

Separation of Purchasing and Operating Functions In Government Results in Market Imperfections.

Kodak's theory also ignores institutional barriers to evaluation of service costs at the time a competitive bid is issued. A central procurement officer may be charged with buying equipment, but is rarely charged with operating, maintaining, or servicing the equipment. *See e.g.*, Alaska Stat. 36.30.005 (centralized procurement authority). Equipment purchased *en masse*, at a quantity discount, may be delivered far and wide across the State, locking-in operating agencies regardless of the availability (or cost) of manufacturer service. The interests of the centralized procurement officer in obtaining the lowest possible cost for equipment may not take into account the total cost to the operating agency, as measured by the cost of parts and service.

Additionally, State and local budgets are subject to a variety of constraints which Kodak's economic theory does not take into consideration. For example, the State of Alaska has different budgets for capital appropriations and for operating expenses. The capital budget funds one-time costs of purchasing equipment, funding construction projects, condemning land, and the like. *See e.g.*, 1991 Session Laws of Alaska, Chapter 96, § 163 (appropriates $450,000 for purchase of "duplicating equipment"). The operating budget gives agencies the funds needed for the day-to-day-operations of government, including funds to repair and service equipment. *See e.g.*, 1991 Session Laws of Alaska, Chapter 73 (appropriates funds

for "the operating expenses . . . of state government" on an agency basis).

A central procurement officer charged with buying $450,000 of duplicating equipment will measure success by the number of copiers purchased. Capital funds cannot be used to service the machines, and if not spent will lapse back into the State's general fund. After the copiers are delivered, the recipient agencies use funds from the operating budget to obtain the best quality service at the lowest price to the taxpayer.

Where a competitive aftermarket exists, these goals are complementary. The central procurement officer purchases the maximum amount of equipment for the amount budgeted, possibly obtaining quantity discounts and attracting more bidders by the large scale of the purchase. The operating agency is able to obtain the best value for its budget among competing service organizations.

However, when a manufacturer eliminates competition in the aftermarkets, either through monopolization or by tying parts to service, the public purchasing mechanism does not operate effectively. A central purchasing officer, required by law to seek the lowest bid for equipment, using funds which if not spent will lapse, and facing uncertainty in estimating life-cycle costs, is going to award the purchase contract to the lowest bidder. This decision provides a manufacturer with market power in the aftermarkets an opportunity to charge higher prices for service than it could charge in a competitive situation. The net result is less value for the taxpayer dollar.

E.

The "Lock-In" Effect Results in Market Imperfections.

The lock-in effect noted by Respondents in their brief is of special concern to governments. It is not simply the cost of replacing the primary equipment, but associated costs which must be taken into account when analyzing the lock-in effect of an equipment purchase.

For example, governments are major consumers of micrographic equipment. Libraries microfilm books, periodicals, newspapers, and government publications. State archives contain masses of documents, from deeds to birth certificates, which are transferred to microfiche both to save storage costs and to preserve fading or disintegrating paper records from oblivion. Court systems use micrographic systems to record the contents of closed case files, wills, and judicial decisions.

Micrographic systems generally include a computer assisted information retrieval system. A retrieval system can include equipment to record documents on microfiche, a means of encoding data on documents so that it can be read by computer, computer hardware, a software program to tie the whole package together, and terminals so that the public and government employees can access the data. Such a system can cost several hundred thousand dollars in fixed costs, not including the labor needed to design the system so that it meets the needs of the government and the public.

These systems are integrated. That is, the component elements of one element are designed to work together

with those of another. Before a governmental purchaser of Kodak micrographic equipment can rationally consider changing brands, it must consider costs of the entire system. These costs include retraining personnel and recoding data. "Industry standards" for data transfer notwithstanding, changing from one micrographic system to another is fraught with expense and peril. *See, e.g.*, JA 424-425.

In practical terms, the lock-in effect of an initial decision by a public agency to purchase a certain brand of equipment is substantial. This results in market imperfections that, as the Court of Appeals noted, "can keep economic theories about how consumers will act from mirroring reality." 903 F.2d at 617.

F.

The *Matsushita* Standard Applied.

The members of NASPO and NIGP have vast experience in public purchasing. They strongly disagree with Kodak's view that it "simply makes no economic sense" that a manufacturer with market power in the parts market will use that power to earn monopoly profits in the service market. Petitioner's Br., at 29; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nature of public purchasing, budgetary constraints, and the lock-in effect make it quite likely that such an equipment manufacturer – even without market power in the interbrand market – can reap monopoly profits in service through a judicious use of its power over parts.

Kodak's theory that consumers accurately project the lifetime costs of high technology equipment at the time of purchase, accurately weigh the possibility of monopoly rents for parts and service, and take these factors into account when making an initial equipment purchase is simply unrealistic when applied to the public sector. This is not a perfect market, and cannot be examined using theory alone.

If the record were complete, this Court could make an informed decision on the anti-competitive effects of the conduct involved. But the record is not complete. As other amici and Respondents note, the District Court drastically truncated discovery. The Court of Appeals was correctly reluctant to decide this case on a "theoretical basis." 903 F.2d at 617.

Respondents have raised disputed issues of material fact, and – as shown above – their arguments "make[] economic sense." *Matsushita*, 475 U.S. at 587. The public interest is best served by a vigorous, competitive business environment in the aftermarkets for parts and service. When market power over parts is used to restrain competition in service, both competitors and consumers suffer. *Jefferson Parish Hosp.*, 466 U.S. at 15.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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IMAGE TECHNICAL SERVICE, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, dba G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICE, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, INC.; dba MICRO IMAGE; MIDWEST MICROFILM EQUIPMENT & SERVICES, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, TEXAS, UTAH, VERMONT, WASHINGTON AND WEST VIRGINIA, IN SUPPORT OF RESPONDENTS

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No. 90-1029

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICE, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, TEXAS, UTAH, VERMONT, WASHINGTON AND WEST VIRGINIA, IN SUPPORT OF RESPONDENTS

The States of Ohio, Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Texas, Utah, Vermont, Washington, and West Virginia (hereinafter the "Amici States") submit this brief in support of Respondents' positions that: (1) the definition of market power should not be construed to require monopoly power in an

unlawful tying arrangement, and; (2) the decision of this Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), should not be extended to evaluate claims involving direct evidence of agreement or claims involving unilateral conduct, particularly where there is a limited discovery record on market power issues.

INTERESTS OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted narrowing of the definition of market power applied to unlawful tying arrangements, and undue expansion of the use of summary judgment in antitrust litigation. First, the Attorneys General are the chief law enforcement officers of their states and are charged with the duty of enforcing the antitrust laws. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.[1] The Attorneys General also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief.[2] Moreover, they are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law. The States thus play a major role in antitrust enforcement and have a substantial interest in ensuring that the federal antitrust laws are interpreted in accordance with sound antitrust policy and with this Court's prior decisions.

[1] 15 U.S.C. §15c. *See Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (common law *parens patriae*).

[2] *See Georgia v. Evans*, 316 U.S. 159 (1942).

Second, vertical restraints raise issues of great concern to the Attorneys General. Amici States have uncovered instances of antitrust violations by equipment manufacturers accomplished through vertical restraints. Their Attorneys General have brought antitrust actions against such organizations,[3] and are currently investigating various categories of restraints in a number of industries. The positions urged by the Solicitor General and Kodak could effectively immunize anticompetitive conduct by manufacturers and allow practices harmful to consumers to continue unchecked.

Finally, the Attorneys General represent municipalities, counties, state agencies and other government entities that purchase goods and services that are or could be affected by vertical restraints. A decision elevating the showing required to sustain a *per se* tying violation could create insurmountable barriers to successful prosecution of tying claims and impede the States' efforts to preserve competition and to meet budgetary pressures. Similarly, any expansion of the use of summary judgment to defeat claims would likely raise the price and lessen the quality of such service for consumers, and could jeopardize the pro-competitive benefits of multi-sourcing that the States have increasingly sought to employ in purchasing products and services.

The Amici States, both individually and in cooperation with one another, have taken an active role in the enforcement of the antitrust laws. They are committed to

[3] *See, e.g., In re Panasonic Consumer Elecs. Antitrust Litig.*, 1989-1 Trade Cas. (CCH) ¶ 68,613 (S.D.N.Y. 1989).

ensuring that their citizens enjoy the benefits of free competition. The issues involved in this case are of major importance to the preservation of such competition. For the reasons stated herein, the Amici States strongly urge this Court to affirm the judgment of the Court of Appeals.

SUMMARY OF ARGUMENT

Amici States address two issues briefed by the Solicitor General and Kodak which the States believe misconstrue existing law. First, the Solicitor General seeks to blur the distinction between the market power needed to establish *per se* tying claims under §1 of the Sherman Act and the monopoly power needed to establish a violation under §2. Contrary to the Solicitor General's assertions, market power for tying purposes is not "akin to monopoly power" either in kind or "in degree." S.G. Br. at 22, n. 21. Rather, as this Court made clear in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), the market power aspect of a *per se* tying claim can be supported by a showing that the seller of the tying product enjoys a large market share, a patent, or some unique characteristic that makes "anticompetitive forcing . . . likely." *Id.* at 16. Opinions in both this Court and the lower courts have consistently recognized that market power for tying claims differs in kind as well as degree from the monopoly power with which §2 is concerned. *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-03 (1969); *Dimmitt Agri Indus., Inc. v. CPC Int'l., Inc.*, 679 F.2d 516, 528-29 and n.11 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). The Solicitor General has offered no justification for abandoning this distinction, and moreover, this case –

in which summary judgment was rendered prior to any substantive discovery regarding market power – offers a poor vehicle for adopting a new standard.

Second, the Solicitor General and Kodak err in contending that summary judgment was proper under the standards enunciated in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In that case, summary judgment was granted only after "several years of detailed discovery," because plaintiffs were able to produce only indirect, circumstantial evidence of the alleged predatory pricing conspiracy. *Id.* at 578. It was in the conspiracy context that the Court concluded that if a plaintiff's conspiracy claim is "implausible," plaintiff must then "come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Id.* at 587.

The facts of this case, involving both unilateral conduct and an explicit agreement, offer no justification for extending *Matsushita* beyond the conspiracy context. Not only did the Court of Appeals find an explicit tying agreement, summary judgment was granted here after very limited discovery. *Matsushita*'s standards are inapplicable to claims in which there is direct evidence of agreement or to Sherman Act §2 claims involving unilateral conduct. *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 906 F.2d 432, (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991). Respondents, and other antitrust plaintiffs like them, should be afforded an opportunity to develop their theories through

appropriate discovery before a motion for summary judgment is entertained.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S STANDARD FOR DETERMINING THE REQUISITE AMOUNT OF ECONOMIC POWER NEEDED TO ESTABLISH A TIE-IN PER SE UNLAWFUL UNDER SECTION 1 OF THE SHERMAN ACT.

This Court has properly delineated the elements which may support a showing of economic power sufficient to establish *per se* liability under Section 1 of the Sherman Act in tying cases. In *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) (*"Jefferson Parish"*), this Court held that the market power aspect of a *per se* tying claim can be supported by a showing that the seller of the tying product enjoys a large market share, a patent, or some unique characteristic that makes "anticompetitive-forcing . . . likely." Both this Court and the lower courts have recognized that this market power differs in kind as well as degree from the monopoly power with which §2 is concerned. *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-03 (1969) (*"Fortner I"*); *Dimmitt Agri Indus., Inc. v. CPC Int'l., Inc.*, 679 F.2d 51, 528-29 and n. 11 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

In *Fortner I*, this Court unequivocally stated:

> The standard of "sufficient economic power" does not . . . require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market.

394 U.S. at 503.

The *Fortner I* language provides a definition of market power which demonstrates that Kodak and the Solicitor General overstate their case when they argue that market power or economic power is tantamount to monopoly power. Many years later, this Court correctly pointed out that "it is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *per se*." *Jefferson Parish*, 466 U.S. at 9. This well-settled reasoning applies squarely to this case. Now is not the time to reform well-settled law, particularly in light of the scant record below. Furthermore, this Court's decision in *Jefferson Parish* is supported by congressional policies underlying the antitrust laws. *Jefferson Parish*, 466 U.S. at 10.

Turning to *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977) (*"Fortner II"*), this Court explained that economic power exists when a seller has power within the market for the tying product to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. Economic power for tying purposes in *Fortner II* is an *appreciable* level of economic power, not

monopoly power as is needed for a Section 2 case. The Court in *Fortner II* further inquired as to whether the seller has some advantage not shared by its competitors in the market for the tying product. Clearly, the Court focused on economic power used as leverage, not monopoly power to control a defined market. *Id.* at 620.

The power to control or force a competitive advantage in a given market for a tied product may also be inferred from the uniqueness of the tying product. *Fortner I, Fortner II* and *Jefferson Parish* all discuss the necessity to ask whether the tying product enjoys some market advantage as a result of its uniqueness or whether the government has granted the seller a patent or similar monopoly over a product. *E.g., Jefferson Parish,* 466 U.S. at 16-17; *Fortner II,* 429 U.S. at 617. It is undisputed that Kodak replacement parts are necessary for Kodak high volume microprocessors and micrographic machines. In this sense they are unique. By tying the availability of Kodak replacement parts to equipment service, Kodak thus may subject itself to the invocation of traditional *per se* analysis. It is the existence of uniqueness or a patent or a monopoly over a product which triggers the *per se* analysis which applies in this case.

Quite apart from the flaws in their overall theory of market power, Kodak and the Solicitor General also err in suggesting that the Ninth Circuit's decision departs from existing precedent. For example, this Court in *Jefferson Parish* stated quite clearly what an antitrust plaintiff, asserting a tying claim, must prove in order to show the kind of anticompetitive forcing that makes *per se* condemnation appropriate:

> *[P]er se* prohibition is appropriate if anticompetitive forcing is likely. For example, if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power . . .
>
> The same strict rule is appropriate in other situations in which the existence of market power is probable. When the seller's share of the market is higher . . . *or when the seller offers a unique product that competitors are not able to offer* . . . the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate.

466 U.S. at 16-17 (citation omitted; emphasis added). The Ninth Circuit decision falls squarely within the guidelines delineated in *Jefferson Parish.*

Additionally, as the Court of Appeals below observed, the District Court denied Respondents the opportunity to engage in discovery on important facts of Kodak's market power, including the extent to which Kodak parts were patented. Under these circumstances, the Court of Appeals properly concluded that, on the record before it, Respondents had made a sufficient showing of market power to survive summary judgment. Nothing in the Court of Appeals' decision warrants the acceptance by this Court of the invitation, extended by Kodak and the Solicitor General, to depart from the market power requirements for tying cases that this Court has consistently espoused.

The Solicitor General submits that the essence of Respondents' claims is that Kodak has attempted to use its monopoly over parts to restrain competition in the

market for service of equipment by tying service to parts. However, the Solicitor General views the "key fact" in this case as Kodak's alleged lack of market power in the equipment markets. Because Kodak "lacks power in equipment markets", the Solicitor General asserts, "it is implausible that it could exercise market power in an aftermarket for replacement parts . . . " S.G. Br. at 12-13. While conceding that economists have constructed models in which firms have an incentive to exploit their locked-in customers, the Solicitor General assumes, on the limited state of the record before the Court of Appeals, that it is economically implausible for Kodak to have any market power in the equipment markets, presumably on the basis that a twenty-three per cent market share[4] is insufficient for any market power and because, as a theoretical matter, any attempt to price parts or service supra-competitively lacks long-term effects upon competition.

Economic analyses over several decades have identified conditions under which tying and related practices do not yield above-normal profits and, moreover, have

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[4] The actual extent of industry concentration and of Kodak's market shares in various equipment markets is factually disputed by the parties. Respondents, for example, point to evidence which they assert shows that Kodak has a 28 per cent share of the high volume copier market prior to Kodak's acquisition of IBM's copier business, a 42 per cent share of the market for capture products, and a 51 per cent share of an asserted separate micrographic market for computer assisted retrieval systems. JA 159, 177. Respondents should be able to develop such evidence, which would further undermine the Solicitor General and Kodak's assumption that Kodak lacks market power in equipment markets.

suggested efficiency explanations for tying. The same literature, however, also indicates that tying may have adverse effects, two of which may be present here. First, one motivation for tying when the seller has market power is price discrimination. According to some economists, the practice is benign because the goal is not to exclude rivals. But Posner argues otherwise. Price discrimination, "by increasing the expected gains from monopoly, . . . increases the social costs of monopoly". R. Posner, *Antitrust Law: An Economic Perspective* at 177 (1976). Second, more recent literature on strategic interactions among firms has developed new insights into the potentially exclusionary effects of tying. This literature has shifted attention away from the question of how tying works, given the demand characteristics, to the critical issue of how tying affects the structure (number and type of sellers) of the industry. Whinston, for example, has demonstrated that tying may exclude otherwise efficient rivals in the tied good market by denying them access to a sufficiently large customer base. Tying by several firms, none of whom may be dominant, can produce a similar result. Whinston, *Tying, Foreclosure, and Exclusion*, 80 Am. Econ. Rev. 837 (Sept. 1990).

In this light, Kodak and the Solicitor General's theoretical assumption that a firm with a twenty-three percent market share cannot have market power, and thus there is no need for further inquiry, is suspect. The approach preempts an inquiry into the likely consequences of adoption of similar practices by rival firms on the ability of independent firms to compete in the tied good market. Moreover, Amici States would suggest that the conclusion that a firm with twenty-three percent market share has no

market power is incorrect without further inquiry. We note that the relationship between market share and market power is complicated. As Landes and Posner have argued, market share may be a misleading indicator of market power, which they define as the ability of a firm or group of firms to raise price without losing a large share of its customers so as to make the price increase unprofitable. Indeed they demonstrate that market share is but one of three major determinants of market power, while the other two concern: (1) the ability of rival firms to increase their output within a reasonably short period of time; and (2) the ability of consumers to find substitutes over a reasonably short period of time. Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 at 996 (1981). In this instance, the products in question are differentiated, some customers may have substantial investments in specific brands, and customers may have incurred such costs when switching to rival brands. Further discovery into the factual circumstances is therefore appropriate.

II. MATSUSHITA'S SUMMARY JUDGMENT STANDARDS ARE INAPPLICABLE TO THE CLAIMS PRESENTED IN THIS CASE

Both Kodak and the Solicitor General submit that the courts below should have applied the standard set forth in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("*Matsushita*"), which allows summary judgment, according to the Solicitor General, "if the factual context renders the claim implausible – if the claim is one that makes no economic sense." S.G. Br. at 10. This reading expands *Matsushita* far beyond its intended scope.

First, there are substantial differences in the procedural posture of the claims before this Court and those presented for summary judgment disposition in *Matsushita*. Summary judgment was granted in *Matsushita* after "several years of detailed discovery . . . " 475 U.S. at 587. In this case, summary judgment was granted by the District Court after only limited discovery.[5] Not surprisingly, the Court of Appeals opined that inasmuch as market power issues were not fully developed through discovery, it could not uphold the District Court's grant of summary judgment based upon Kodak's theory that competition in interbrand equipment markets might discipline its power in the parts market. 903 F.2d at 616. Amici States submit that an expansion of *Matsushita*'s standards to evaluate competing economic theories as to the plausibility of the exercise of market power unnecessarily elevates theory over facts. While the Solicitor General posits economic theory, Respondents have not been afforded the opportunity to adequately develop facts.

Second, it is inappropriate for a court to apply *Matsushita* to cases in which there is direct evidence of agreement or allegations of unilateral conduct. As the issues are framed by Petitioner and the Court of Appeals, this case involves two claims: a tying claim cognizable under §1 of the Sherman Act, and monopolization violative of §2 of the Sherman Act. The second claim is based on

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[5] Respondents had only been permitted to propound one set of interrogatories, serve one request for production of documents on Kodak, and take a total of six depositions. Pet. App. 36-B.

unilateral action by Kodak. And while Kodak suggests that it acted unilaterally in tying parts to service, the Court of Appeals found that Kodak entered into written tying agreements with its equipment owners, which precludes characterization of Kodak's conduct as independent. 603 F.2d at 619.

Matsushita's summary judgment standards must be evaluated in the context in which they were established, that is, in the context of the range of permissible inferences that may be drawn from ambiguous circumstantial evidence of conspiracy. As noted by the Ninth Circuit in *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991) (*"Petroleum Products"*), the "key to the proper interpretation of *Matsushita* lies in the Court's emphasis on the dangers of permitting inferences from certain types of ambiguous evidence." A mistaken inference of conspiracy in a claim involving an alleged predatory pricing scheme may be especially costly, because it may "chill the very conduct the antitrust laws are designed to protect" – cutting prices in order to increase business. *Matsushita*, 475 U.S. at 594. These concerns arise in the context of whether to permit inferences of conspiratorial action from circumstantial evidence. Where, as here, there is direct evidence of a tying agreement, there can be no danger of drawing a mistaken inference which could deter legitimate conduct.

The language of this Court in *Matsushita* supports Amici States' proposition that the economic plausibility of competing inferences of conspiratorial or independent action plays no role in the proper evaluation of whether a party, for summary judgment purposes, has presented

triable issues on Sherman Act Section 1 tying claims. Citing to the absence of direct evidence of a conspiracy to drive plaintiffs out of business by predatory pricing, this Court stated that to survive summary judgment, the plaintiffs must present evidence that tends to exclude the possibility that the conspirators acted independently, *i.e.*, plaintiffs must show that the inference of conspiracy is reasonable in light of competing inferences of independent action or collusive action that could not have harmed the plaintiffs. *Matsushita*, 475 U.S. at 588. If defendants had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. Courts have correctly observed the distinction between direct and circumstantial evidence essential to this Court's reasoning in *Matsushita*:

> We emphasized that the cases of both the Supreme Court and this Court have honored the difference between weighing direct evidence and refusing to draw unreasonable inferences from circumstantial evidence. We summarized our cases as indicating that *Matsushita* applies where the non-movant relies[s] on inferences from circumstantial evidence . . . [T]he *Matsushita* inquiry was appropriate only where there is no direct evidence of a conspiracy . . .

Petroleum Products, 906 F.2d at 441 (citations omitted). *See also, Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania*, 815 F.2d 270 (3rd Cir. 1987); *Arnold Pontiac GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3rd Cir. 1987).

Leading commentators support this reading of *Matsushita*. *Matsushita* "suggests that in the *absence* of direct evidence of an agreement or conspiracy, the plaintiff seeking to avoid summary judgment must show that the conspiracy is economically rational or likely." P. Areeda & H. Hovenkamp, *Antitrust Law* §316.1, at 299 (Supp. 1990). Thus, summary judgment can be resisted either by presenting direct evidence of conspiracy or by showing both that the alleged scheme is economically rational and sufficient circumstantial evidence that a conspiracy was more likely than not. *Id.*

The dangers inherent in the expansion of *Matsushita* beyond the context of circumstantial evidence of conspiracy are not theoretical. In *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, *amended*, 893 F.2d 293 (11th Cir. 1990), a provider of a bar review course agreed not to compete outside of Georgia in return for its rival's agreement to abandon its operation in that state. Despite the existence of this explicit horizontal agreement allocating geographic territories, the Eleventh Circuit, citing *Matsushita*, determined that "conduct as consistent with permissible competition as well as illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 1422. The Circuit Court in *Palmer* reasoned that because one of the agreeing parties intended not to operate outside of Georgia anyway, a contractual promise not to do so was not an antitrust conspiracy. This Court summarily reversed the Eleventh Circuit's conclusions in *Palmer*. 111 S. Ct. 401 (1990). As both the dissent in the Eleventh Circuit's decision in *Palmer* and commentators have pointed out, neither *Matsushita* nor *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) apply where

direct evidence of concerted action is present.[6] *Palmer*, 874 F.2d at 1431 (Clark, J., dissenting); P. Areeda and H. Hovenkamp, *Antitrust Law* §316.1, at 301 (Supp. 1990) ("*Matsushita*'s language has little to do with the appraisal of any explicit agreement"). Amici States respectfully request that this Court decline to adopt the Solicitor General's suggestion that *Matsushita*'s standards for evaluating ambiguous evidence of an agreement be expanded to evaluate the 'plausibility' of economic power in tying or monopolization cases.

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[6] Some commentators have suggested that to the extent that application of the *Matsushita* implausibility standard transforms static or unrepresentative impressions about the state of economic thinking into inflexible rules of law, case law may lag significantly in reflecting the most advanced understanding of the competitive effects of various types of conduct. DeSanti & Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59 Antitrust L. J. 609, 652-53 (1990). Amici States agree with the foregoing commentators to the extent they conclude, despite the potential dangers of judicial rigidity from an incorrect interpretation of *Matsushita*, that this Court did not intend to foreclose consideration of "rival economic theories operating within an efficiency framework. The focus upon economic rationality provides at least an indirect invitation for plaintiffs to invoke an expanding economic literature that identifies welfare-reducing possibilities from certain types of pricing behavior. Recent industrial organization literature concerning game theory and strategic behavior provides a rich collection of possible means by which plaintiffs can establish the economic rationality of challenged pricing conduct." *Id.* at 651-52.

CONCLUSION

Even the limited record that Respondents were permitted to develop in this case provides sufficient information upon which to conclude that summary judgment was improper. This is particularly true in light of the existence of an express tying agreement, which obviates the need to prove a conspiracy. Furthermore, the Ninth Circuit remained consistent with existing case law in reversing and remanding this case. Proof of a *per se* tying arrangement may be inferred where the manufacturer of the tying product enjoys economic power. Such economic power should not be construed as tantamount to monopoly power. For the reasons stated herein, the Amici States strongly urge this Court to affirm the judgment of the Court of Appeals.

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In The

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October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., et al.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF GRUMMAN CORPORATION IN SUPPORT OF RESPONDENTS

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No. 90-1029

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., et al.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF GRUMMAN CORPORATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

Grumman Corporation, a leading U.S. defense contractor based on Long Island, New York, employs over 24,000 people. It both purchases and vends substantial amounts of computer maintenance. Grumman's operations are classified into four business segments: (1) aerospace – including the design and production of military

[1] Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37 of the Rules of this Court.

aircraft, space systems and commercial aircraft components; (2) electronics systems – including sophisticated electronics for aircraft, computerized test equipment and other defense-related products such as the joint STARS airborne surveillance system, utilized by the United States in the Gulf War; (3) special purpose vehicles – including fabrication of long life vehicles for the U.S. Postal Service, aluminum truck bodies and emergency vehicles; and (4) information and other services – including data systems operation and technical services which provide support for the U.S. space shuttle program and Grumman aircraft.

Grumman's defense and commercial operations are computer intensive. Grumman is both a customer and seller of computer support services. In the early 1970s, to support its computer-based operations, Grumman's Data Systems operation developed a computer maintenance division. Grumman has saved considerable expense as a result of servicing its own computers. Having developed this capability, Grumman later began to offer computer maintenance and other computer support services on a commercial basis to other computer users. Grumman Systems Support Corporation provides support services to users of a number of different brands of computer hardware and is now ranked as one of the largest independent service organizations ("ISOs") in the United States.

Grumman Systems Support Corporation is presently engaged in a litigation against a computer manufacturer which involves the same issue as presented in this case.[2]

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[2] *Data General Corporation v. Grumman Systems Support Corporation*, No. 88-0033-S (D. Mass., filed March 28, 1988).

Grumman believes that the market definition standard utilized by the Court of Appeals in this case is both correct and consistent with the standards established by this Court. Markets should be defined through factual investigation, not by fiat. Grumman is submitting this brief *amicus curiae* because reversal of the decision of the Court of Appeals threatens Grumman's national defense and commercial operations. Without enforcement of the antitrust laws over the markets for high technology parts and support services[3], Grumman's access to high quality, cost-effective computer support services for its defense, space and commercial activities will be endangered. Likewise, such a result will prevent Grumman from providing similar high quality, cost-effective computer support services on a commercial basis to other U.S. businesses.

Reversal would legalize a manufacturer's exercise of monopoly power in parts and service markets merely because the manufacturer has limited market power in the product sales market. Grumman believes that the better rule is to encourage competition in all markets.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals correctly recognizes the legal viability and economic importance of competitive markets for the sale of high technology support services and spare parts. Allowing for the existence of

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[3] The legal analysis is the same for any high technology product, be they copiers, computers, medical imaging equipment, etc.

such markets separate from high technology product sales markets conforms with this Court's longstanding practice to look to the availability of substitutes in defining a market. Rejecting economic analysis and holding that market power for support services can never exist absent product sales market power would discourage competition in high technology service and parts markets to the detriment of Grumman and other service providers and consumers.

ARGUMENT

It is increasingly common practice in high technology industries for manufacturers, who once welcomed parts or service providers for their products, to impose new policies designed to eliminate competition in support service and spare parts sales markets. The respondents in this case, independent service organizations (ISOs) who specialize in servicing Kodak photocopy and micrographic equipment, challenged Kodak's attempt to alter the service market by implementing a new policy of refusing to sell replacement parts for Kodak equipment to ISOs or consumers who preferred to obtain support services from ISOs rather than Kodak. A question of fact was raised whether Kodak's change of policy lacked a competitive business justification and was intended, instead, to exclude competition for the service of Kodak equipment. The Court of Appeals' market analysis was proper.

I. THE DECISION OF THE COURT OF APPEALS CONFORMS WITH THE LONGSTANDING PRACTICE TO LOOK TO THE AVAILABILITY OF SUBSTITUTES IN DEFINING A MARKET.

Relevant antitrust markets have always been defined by this Court through factual investigation. *United States v. E.I. duPont de NeMours & Co.*, 351 U.S. 377 (1956); *accord Maple Flooring Mfrs. Ass'n. v. United States*, 268 U.S. 563 (1925); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). "Each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record. . . . " *duPont*, 351 U.S. at 395 (quoting *Maple Flooring*, 268 U.S. 563).

In *duPont*, the leading case on market definition, this Court looked to the existence of substitutes to determine the product dimension. Under *duPont*, a "market is composed of products that have reasonable interchangeability for the purposes which they are produced – price, use, and qualities considered." *duPont*, 351 U.S. at 404. Application of this analysis may lead to a finding of a narrow, relevant market or "submarket" within a larger market: "there may be submarkets that are separate economic entities." *Grinnell*, 384 U.S. 563, 572. The boundaries of a submarket are determined by "examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors." *Brown Shoe*, 370 U.S. 294, 325.

In the present case, respondents argued the existence of a market for support services. The Court of Appeals found that respondents offered sufficient evidence to satisfy the market definition requirements. Petitioner erroneously argues that service and spare parts sales markets cannot exist separate from product sales markets as a matter of law. To the contrary, such markets are both legally and economically sound.

Providing support services for high technology products is typically a brand-specific task requiring extensive training and inventory which is not transferrable to the maintenance and support of other manufacturers' high-technology products. Providing competitive support services to a specific manufacturer's products constitutes interbrand competition because competing service providers are offering their own brand of service for the product. The competitors offer different levels of service and different terms and conditions. Because Grumman and Data General, for example, are competitors for the "same generic product," i.e., support services for Data General equipment, they are engaged in interbrand competition. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977). Such interbrand competition is protected by the antitrust laws.

In practice, the supply and demand for high-technology products is often distinct from the supply and demand for service offerings for such products. Although there may be intense competition in the product sales market[4], competition for the service of a manufacturer's

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[4] Such competition may not be intense because of the market imperfections mentioned in the Ninth Circuit's

(Continued on following page)

product is at least equally intense. This interbrand service competition constitutes a separate market because, taking into consideration prices, quality and similarity of use of other products, there is no reasonably interchangeable substitute for the service of the product. Under the *duPont* standard, a separate market for support services exists because it is the smallest definable market in which a firm with market power profitably can exploit customers.

Application of the *duPont* standard to Grumman's experience with the servicing of Data General computers results in the conclusion that the servicing of Data General computers is a relevant market for an antitrust analysis. Application of the *Brown Shoe* criteria leads to the same conclusion.

A. Industry and Public Recognition.

The high-technology industry and consumers recognize separate markets for the support service and maintenance of many high-technology products. For example, vendors of support services for Data General equipment advertise their services in specialty magazines that are marketed solely to consumers who own Data General products. These vendors do not advertise this service

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(Continued from previous page)

opinion. For example, a certain computer or copier brand may be required for a certain application, reliable comparative information about maintenance costs may not be available to or used by consumers, or purchase of hardware and hardware maintenance within a large organization may be done by different individuals with different objectives.

offering to consumers who own different manufacturers' products. Similarly, service consumers regularly acknowledge that they look to vendors who sell service for their product, rather than manufacturers of other product brands, in selecting service providers.

B. Characteristics and Uses.

The maintenance of specific high-technology products has peculiar characteristics and uses. For example, servicing Data General computer equipment requires specialized skills and knowledge specific to Data General equipment. A field engineer trained to service Data General's computer products could not be expected to service another manufacturer's computer products without extensive retraining. Likewise, servicing Data General computers requires maintaining a large inventory of spare parts which can be used only in Data General computers. Maintenance of high technology products has peculiar characteristics because of the highly technical, specialized differences between different manufacturers' products. For example, competing brands of high technology equipment have different designs, operating systems, peripheral interfaces, protocols and components.

C. Unique Production Facilities.

The maintenance of high-technology equipment typically requires unique production facilities. The most important of these facilities are a large inventory of spare parts and specially trained personnel. For example, a company providing nationwide maintenance on Data General computers must maintain a multi-million dollar

inventory of spare parts and complete, working computers for testing, analyzing and training. Maintaining high-technology products often also requires specialized software diagnostics. All these facilities would be of no use in selling maintenance for another manufacturer's products.

D. Distinct Customers.

The customers for maintenance of specific manufacturer's high technology products are distinct. A business that owns only non-Data General computers will not consider purchasing service for Data General computers. Thus, service vendors of a particular manufacturer's products focus their marketing activities on businesses known to own that manufacturer's products. For instance, vendors of Data General support services advertise in periodicals such as *Focus* and *DG Review* which are directed solely to users of Data General equipment.

E. Distinct Prices.

Prices for maintaining a specific manufacturer's high-technology products are distinct and specific to that manufacturer's products. For example, Grumman and its competitors in the market for servicing Data General equipment specify prices for maintaining a specific Data General computer model based on the characteristics of the equipment. Those prices do not apply to maintenance contracts for other manufacturers' products.

F. Sensitivity to Price Changes.

Prices charged by a vendor of support services for a particular manufacturer's products are sensitive to price changes by other vendors selling support services for the same manufacturer's products. On the other hand, vendor prices for the service of one manufacturer's products are not sensitive to price changes for service on other brands. The fact that IBM[5], for example, raises its prices to maintain a certain IBM computer would be irrelevant (and probably unknown) to an owner of equipment manufactured by other than IBM.

G. Specialized Vendors.

Vendors for maintenance of a particular manufacturer's equipment are specialized. For example, although there are several hundred independent service organizations for various high-technology products in the United States, there are only a dozen or fewer that provide nationwide service on Data General's MV series of computers. Vendors are specialized because maintaining a particular manufacturer's products requires specially-trained field engineers and unique inventories of spare parts and tools. Most high-technology manufacturers

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[5] In 1956, IBM entered into a consent decree whereby IBM agreed, among other things, to sell spare parts to independent service organization competitors. *United States v. International Business Machines Corp.*, 1956 Trade Cas. (CCH) ¶68,245 (S.D.N.Y. Jan. 25, 1956). These sales neither affected parts prices in the spare parts markets for other manufacturer's products nor resulted in any economic harm to IBM. Kodak's arguments to the contrary are without theoretical or historical merit.

themselves are specialized vendors of support services for products manufactured for them. They either do not service other manufacturer's products or they merely broker servicing of another manufacturer's products to a service vendor specializing in the other manufacturer's product.[6]

From Grumman's own experience, parts and service offerings for different brands of high-technology products are not reasonably interchangeable and, therefore, a manufacturer can hold significant market power in markets for spare parts sales or service of a particular product without having significant power in the product sales market. Most major manufacturers of computers have their own proprietary operating systems and architectures. Thus, a business owning a computer has a large investment in training employees and in application programs. In many cases, the costs associated with retraining employees and rewriting application programs (or procuring new licenses for a new system) are so great that a change to another brand of computer would be uneconomic. The end result is that manufacturers can often charge supra-competitive prices for support services or spare parts sales despite fierce competition in the product sales market. When faced with competition, Data General has lowered its prices for service as much as 70% off its published list prices. In its litigation against Grumman, Data General has asserted that its profit ranges from 60%-70%.

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[6] Ironically, they almost never subcontract to the other manufacturer but to an ISO specializing in the support of the other manufacturer's equipment.

Grumman utilizes thousands of computers in its operations. Grumman began servicing its own Data General computer equipment because of the poor service quality and high cost of service offered by Data General. Data General, like Kodak, was charging supra-competitive prices for its service offerings. At the time, there were few, if any, alternatives to service of Data General equipment by any company other than Data General. The only brand of service that existed was Data General service. Grumman and other independent service companies that entered the market created interbrand competition by offering their own brands of service.

By servicing its own equipment, Grumman is no longer subject to Data General's supra-competitive pricing practices. Grumman has realized considerable savings on its Data General computer service. Likewise, Grumman has been able to provide service to other consumers at an average savings of approximately 25% below Data General's price umbrella. These costs savings are indicators of Data General's supra-competitive profit in the Data General support services market.

II. THE DECISION OF THE COURT OF APPEALS FOSTERS COMPETITION.

Competition in product sales, product service and spare parts markets should be encouraged. Not even Kodak questions that the competitive nature of product sales markets is beneficial. Encouraging competition in support services and spare parts sales markets is similarly beneficial. In fact, without controls on excessive market power in these markets, the business activities of

computer-dependent companies such as Grumman would be threatened.

Despite the savings that Grumman has achieved in servicing its own computer equipment and the savings that Grumman offers to other Data General computer users, Data General's unchecked market power in the support services market is a threat to Grumman and other consumers. As detailed in the Affidavit of Joseph Mulderig, attached as Appendix A[7] Data General has used its market power against Grumman, just as Kodak has against respondents, to hinder competition in the support services market.

The decision of the Court of Appeals limits a manufacturer's ability to exclude competition and force consumers to purchase service offerings they do not want. Restraints against the exercise of excessive market power in support service markets should be enforced to provide the consumer the choice of a manufacturer's service offering or the often more versatile, higher quality offerings of an independent service organization. Similarly, the antitrust laws should be enforced to allow consumers the choice of purchasing a manufacturer's integrated system package or purchasing spare parts, support services or diagnostic software separately. The decision of the Court of Appeals fosters competition by allowing consumers' the freedom to choose.

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[7] This affidavit is part of the file in the case cited in footnote 2. For the convenience of the Court, a copy of this affidavit has been lodged with the Clerk's office.

The exercise of excessive market power in any market should be discouraged. Markets for the sale of support services or spare parts should be no exception; otherwise, consumers' freedom of choice is unduly threatened.

CONCLUSION

The application of the antitrust laws is not dangerous. To the contrary, consumer choice encourages quality offerings in the marketplace. Although Grumman is a major manufacturer itself, Grumman favors competition in support services, spare parts sales and product sales markets. A consumer's interest in open competition in all markets, including support services and spare parts markets, is important to the growth of our nation's economy.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1991

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INTEREST OF THE AMICI CURIAE

State Farm Mutual Automobile Insurance Company, Allstate Insurance Company, Nationwide Insurance, Government Employees Insurance Company, United Services Automobile Association, Alliance of American Insuers and National Association of Independent Insurers (the "insurance company amici") are among (or represent) the nation's principal automobile insurers. Together, the constituent companies insure approximately 100 million American motorists. Their concern is over the potential impact of the rule of law proposed by the petitioner and its amici: A manufacturer facing vigorous competition in the sale of equipment conclusively lacks the power to take significantly anticompetitive action in the related aftermarkets. Because of their long familiarity with the automobile industry, the insurance company amici can be of assistance to the Court by demonstrating that the premise of petitioner's argument does not hold true for important aspects of that industry.[1]

The interest of the insurance company amici relates particularly to the repair of crash-damaged automobiles and the vast parts and service markets that have grown to provide these repairs. There is a $9 billion annual "crash parts" market.[2] For decades, virtually all of those parts were available only from the original automobile equipment manufacturer. Recently, a competitive market

[1] The parties' letters of consent have been filed with the Clerk pursuant to Supreme Court Rule 37.3.

[2] Crash parts are metal, plastic and glass components, such as bumpers, fenders, hoods and windshields that are commonly used in the repair of crash-damaged vehicles. They do not include "hard parts," which are functional components such as spark plugs, mufflers, batteries and thousands of others used in the repair and periodic maintenance of the vehicles. The amicus brief of the Independent Auto Aftermarket Association discusses the anticompetitive impact of petitioner's proposed rule on the hard parts industry.

has emerged for some parts, with the result that prices for these parts have plummeted and overall crash parts price indices have fallen significantly.

The rule advanced by the petitioner and its amici would license automobile manufacturers to engage in anticompetitive activities in the aftermarket that can have profound and devastating consequences in this crash repair market. Automobile manufacturers could use their power over those crash parts for which they are the sole source to foreclose the developing competition from independent crash parts manufacturers. That competition now results in savings to insurers and policyholders in the range of $400 million annually.

SUMMARY OF ARGUMENT

This case nominally involves the issue whether respondents offered sufficient evidence to counter petitioner's motion for summary judgment. While we believe that respondents' evidence sufficed to raise genuine issues of fact precluding summary judgment,[3] we assume that respondents' brief will address that issue in detail. The insurance company amici are concerned over the effort by petitioner and the Solicitor General, echoed by the supporting amicus brief of the Motor Vehicle Manufacturers Association ("MVMA"), to have this Court remove all antitrust constraints upon manufacturers' tactics in aftermarkets so long as they face strong competition in the underlying original equipment markets.

Petitioner argues that consumers' equipment purchasing decisions will discipline any manufacturer that charges supracompetitive prices in the aftermarket for

[3] Of particular significance, in our view, was the evidence that petitioner did in fact charge supracompetitive prices for lower quality service. Joint Appendix at 91, 341, 414, 469, 493, *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, No. 90-1029 ("J.A.") and the evidence that petitioner's policies were aimed at eliminating the competition provided by independent service organizations. *See infra* p. 13.

supplies, repair parts and services. That argument may make sense in markets approaching the theoretical free market model—homogeneous products, informed consumers, no transaction costs for switching from one competitor to another and no opportunities for price discrimination. There is no basis, however, for asserting that the same is universally true in the real world, no matter how radically any particular industry's characteristics depart from those of the model. For example, there are industries in which equipment consumers cannot accurately predict lifetime equipment costs or lack sufficient incentive to switch to other equipment vendors. There are other industries in which competing original equipment sellers similarly tie in downstream parts, supplies and repairs or where an insurer rather than the equipment owner bears the costs of such products or services. In all such cases, the competition for original equipment sales fails to prevent a manufacturer's anticompetitive conduct in the parts and service aftermarkets.

Adoption of petitioner's argument carries this danger with respect to the automotive industry: MVMA's automobile manufacturer members will see such a ruling as lifting the legal restraints that prevent them from driving independent manufacturers of crash parts out of business. Automobile manufacturers could accomplish this through their control over the vast majority of repair parts that repair shops must have in order to repair crash-damaged cars. Each of the automobile manufacturers could decide to confine such parts to those repair shops that agree to use only the manufacturer's crash parts when repairing its cars.

Consumer automobile purchasing decisions will not prevent that from happening. The aftermarket crash repair aspect of the automotive industry differs in critical ways from the theoretical free market model because it is unlikely that car buyers will know or have an incentive to react to the manufacturer's elimination of competing crash parts. The car buyer cannot predict accidents,

much less whether it will be the buyer's fault or that of another party who will pay for the repairs, how extensively the car might be damaged, or whether the parts that will have to be replaced could previously have been secured at lower cost from independent manufacturers. The car buyer does know, however, that insurance will cover all or some of the costs. Thus, action by the automobile manufacturer to eliminate independent crash parts will most directly harm the insurance companies and independent crash parts manufacturers—none of which controls the car buyer's decision on which car to buy. Clearly, then, in contrast with petitioner's model of perfect competition, interbrand competition in the automobile industry can play no significant role in deterring the automobile manufacturers from foreclosing independent crash parts manufacturers from the market.

The insurance company amici estimate that the loss of the competition provided by independent crash parts manufacturers would cost in the range of $400 million annually. That is reason enough for the Court to decline the invitation of petitioner and its amici to draw overbroad conclusions from the state of interbrand equipment competition.

ARGUMENT

I. PETITIONER IS REALLY ASKING THIS COURT TO REMOVE ALL ANTITRUST LAW CONSTRAINTS ON AFTERMARKET ACTIVITIES OF MANUFACTURERS THAT LACK POWER IN ORIGINAL EQUIPMENT MARKETS

Petitioner takes the position that "[i]f Kodak does not have market power in the upstream [*i.e.*, sale of the original equipment] markets, it does not matter what other markets it is trying to monopolize." J.A. at 688.[4] The

[4] The MVMA argues "for reversal of the decision below because of the serious adverse consequences of a holding that a manufacturer without market power over the goods it sells can have market power over the replacement parts for those goods." Motor Vehicle Manu-

Solicitor General seemingly frames the proposal in a more benign way: "summary judgment should be granted [in such cases as this] in the absence of evidence showing that the [manufacturer], despite its lack of power in the equipment markets, nevertheless exercises power in the aftermarkets for its equipment." Solicitor General's Brief at 16, *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, No. 90-1029 ("S.G. Br."). It quickly turns out, however, that the Solicitor General finds it inconceivable that such evidence could exist. *Id.* at 16 n.13.

Thus, in substance, the petitioner and its amici seek a ruling that is both novel and sweeping: manufacturers lacking power in original equipment markets must be conclusively presumed to lack power to effect significant anticompetitive restraints in aftermarkets. Their argument is that any supracompetitive pricing in aftermarkets by companies lacking power in equipment markets must be self-defeating because those companies would lose original equipment sales. On this basis, they ask the Court to conclude that no antitrust cause of action lies for activities in aftermarkets by firms that lack power in the related original equipment markets—whether the charge is monopolization, attempted monopolization, or tying, and whether on a per se or unreasonable restraint of trade theory.[5] The insulation of such activities is not

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facturers Association Brief at 1, *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, No. 90-1029 ("MVMA Br."). The adverse consequences are that the industry would be subject to allegedly vexatious litigation. *Id.* at 4.

[5] We assume, *arguendo*, that Kodak's equipment market share is insufficient to create liability for tying purposes, though the record suggests room for doubt on that score. *See infra* notes 6, 12. In any case, the proposed rule, based as it is on a conclusion that the manufacturer's lack of power in the equipment market is dispositive of any issue concerning anticompetitive aftermarkets, seems particularly inappropriate under a rule of reason analysis. The Court said in *Jefferson Parish Hospital District No. 2* v. *Hyde* that an antitrust violation could be established based on an analysis of competitive effects even when "the seller does not have either the

justified by petitioner's perfect market model and would lead to disastrous consequences in the automobile crash-repair market.

II. A LACK OF MARKET POWER OVER ORIGINAL EQUIPMENT SALES DOES NOT NECESSARILY PRECLUDE SIGNIFICANT ANTICOMPETITIVE CONDUCT IN AFTERMARKETS

It is one thing to say that a manufacturer's 20% market share in the original equipment market precludes a holding that its tying of one aftermarket to another is unlawful per se.[6] It is quite another to say that if the manufacturer has only a 20% market share at the equipment level, any tying, exclusive dealing or attempted monopolization of aftermarkets is in effect *lawful per se*.

We do not say that petitioner's underlying economic theory can never make sense. Perhaps there are certain circumstances approaching ideal market conditions in which competition for sales of original equipment may indeed constrain the manufacturer's aftermarket behavior. Such situations might well warrant requiring plaintiff to demonstrate that significant anticompetitive aftermarket conduct by equipment manufacturers is possible despite the existence of vigorous competition for original equipment sales. It goes too far, however, to presume con-

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degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product." 466 U.S. 2, 17-18 (1984); *see also Smith Mach. Co.* v. *Hesston Corp.*, 878 F.2d 1290, 1298 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1119 (1990).

[6] The court below found that "Kodak's share of the interbrand copier and micrographic equipment markets varies and may approach as much as twenty-three percent." *Image Technical Servs., Inc.* v. *Eastman Kodak Co.*, 903 F.2d 612, 618 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2823 (June 17, 1991) (No. 90-2029). We understand, however, that in respondents' view, Kodak's share of some of the relevant markets involved was considerably higher.

clusively that no such proof is possible, even where there are significant deviations from the perfect market model. That would surely not be justified with respect to important aspects of the automobile industry, the largest industry in the country.

We next discuss some of the factors which, if present, make it highly unlikely that new equipment sales competition has the requisite deterrent effect. In the succeeding section, we apply the relevant factors to the automobile repair industry.

A. *Lack of Customer Awareness.* A key link in the petitioner's chain of reasoning is that new equipment customers will know of any exploitation of old customers by the manufacturer in the relevant parts and service aftermarkets that significantly increases overall life cycle costs for the equipment above competitive levels. Indeed, petitioner relies heavily on its assertion (controverted by respondents) that Kodak customers take aftermarket prices into account in making their decisions on original equipment purchases. Petitioner's Brief at 12, *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, No. 90-1029 ("Pet. Br."). In like manner, the Solicitor General concedes (at least at first) that consumer awareness, at the time of purchase of the original equipment, of what the manufacturer does in the aftermarket is a *sine qua non* for the presumed disciplinary effect to occur. S.G. Br. at 16 n.13.[7]

In any case, the logic of petitioner's argument requires that prospective new customers be aware of the parts and

[7] Later in its brief, however, the Solicitor General asserts that customer awareness is irrelevant because competition for new sales would prevent supracompettive pricing in aftermarkets. S.G. Br. at 19 n.18. This is assertedly because the manufacturer would lose not only the new sales but also all the aftermarket profits on those new sales. That argument, however, also requires that the customers have knowledge of, and an economic incentive to react to, the manufacturer's aftermarket prices.

service costs imposed by the manufacturer on those who already own its equipment. Otherwise, the manufacturer has little reason to fear that what it does in the aftermarket will cause loss of new equipment sales to competitors.[8] While there may be examples of industries in which consumers will have such knowledge, because competitors will have an interest in informing them, we see no basis for conclusively presuming such knowledge in every case. Particularly in the case of complex equipment, manufacturers may be able to delay disclosure or hide the fact that they have increased service prices—perhaps by gradually lowering the level of and quality of service. Service costs for complex machinery are particularly difficult to compare because the services are so heterogeneous and are spread out over a long period of time. Evidence that consumers would not have sufficient information at the time of initial equipment purchase to predict high aftermarket costs is therefore unquestionably relevant in any case in which, like here, it is argued that competition for original equipment sales precludes a rational manufacturer from engaging in anticompetitive behavior in aftermarkets.[9]

[8] *See* Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 491, 510 (1981). *See generally* Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U. L. Rev. 661 (1982); George J. Stigler, *The Economics of Information*, 695 J. Pol. Econ. 213 (1961); Tibor Scitovsky, *Ignorance as a Source of Monopoly Power*, 40 Am. Econ. Rev. 48 (1950).

[9] Petitioner and the Solicitor General suggest, in effect, that the Court need not be concerned over tying arrangements because the public benefits when equipment manufacturers are permitted to package equipment, supplies, parts, and repair services and to compete on the basis of the cost of the packages over the life cycles of their equipment. Pet. Br. at 4 & S.G. Br. at 14. The benefits are not so clear. Equipment manufacturers with so much more information on which to make life cycle cost predictions have substantial bargaining advantages over consumers who lack relevant experience. Those advantages are reduced if consumers can buy the items separately, because the consumers are then in a position to

B. *Similar Practices by Competitors.* Evidence of competitors' practices in aftermarkets may also suffice to preclude summary judgment premised on a defendant's lack of market power over original equipment sales. This Court has consistently held that the lawfulness of a company's exclusive dealing or tying arrangements turns in part on whether significant parts of the market are subject to similar restraints by the company's competitors. *Standard Oil Co.* v. *United States*, 337 U.S. 293, 309 (1949); *Jefferson Parish Hosp.*, 466 U.S. at 12; *see also Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1143 (8th Cir. 1981) (finding the existence of sufficient market power partly because the tying arrangement was "uniformly followed by nearly all of the" defendant's competitors), *cert. denied*, 457 U.S. 1111 (1982).

Taking account of competitors' practices makes good sense here. An oligopolistic manufacturer would have little reason to fear that exploiting existing customers on prices of service and parts will cause a loss of new equipment sales if the offerings of its competitors are not more favorable.[10]

Accordingly, there can be no escape from the conclusion that evidence of competitors' sales and aftermarket policies is also quite relevant in determining whether competition for new sales precludes a manufacturer from

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make precise price comparisons for each of the items separately and to make those comparisons at the actual times of purchases. Such consumers, by reason of their being better informed and able to bargain more effectively, are likely to be able to reduce their total ownership and operating costs for the lifetime of the equipment.

[10] It may be, of course, that one or more competitors in an oligopoly may see an opportunity to gain new sales by breaking ranks. It may also be, however, that a potential renegade may perceive that others will follow suit, which would quickly cancel any gains it might receive and leave everyone worse off. Accordingly, each might well decide that it is in its long-term interest to resist the temptation to break ranks. Were it otherwise, there would be no need for antitrust concern over cartels and oligopolies.

engaging in significantly anticompetitive aftermarket tying and other exclusionary practices. Summary judgment for the manufacturer based purely on its share of the equipment market—without affording plaintiff any opportunity to demonstrate that its competitors follow similar aftermarket policies—would be inappropriate.

C. *Product Differentiation.* The fact that a manufacturer's market share is in the 20% range does not preclude the possibility that it may exact leverage with respect to a significant number of customers for whom, for one reason or another, other equipment is not readily substitutable.[11] For example, much of the new business may come from existing customers who must add to their existing equipment or replace some units. These customers may be "locked in" to a particular manufacturer's equipment because of the economic penalties they would have to bear to switch to another manufacturer's equipment. *See, e.g.*, J.A. at 424-25, 467, 487-88. Such customers may to some extent be protected by the manufacturer's need to compete for the business of the other customers, *see* Pet. Br. at 23-24 n.9, but it is a question of degree, depending on the size of the one group compared with the other, and depending also on the seller's ability to price discriminate. There may thus be cases in which the profits to be derived from sales of high-priced aftermarket parts and service to those for whom other products are not a ready substitute more than make up for the lost profits the manufacturer would have secured from new sales to others.[12] This calculation is of course unnecessary if the

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[11] *See, e.g.*, F. M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 16-17 (3d ed. 1990).

[12] Such may be the case here. Petitioner's claim that customers do take into account total costs, including those that occur in its aftermarkets, has to be considered along with the finding by the court below that—viewing the facts most favorably to the respondent—petitioner in fact charged supracompetitive prices for lower quality service. *Image Technical Servs.*, 903 F.2d at 614. These two

manufacturer can charge the "locked-in" customer higher prices.[13]

Petitioner dismisses such evidence on the ground that Kodak could not maltreat old customers without driving new customers into the arms of competitors. It may be, however, that customers are unaware of lower-priced alternatives. Furthermore, petitioner's argument fails to account for the possibility that the customer needing to expand its Kodak equipment or replace one or more units would lack an incentive to turn to other manufacturers because the supracompetitive aftermarket prices, troublesome though they might be, would be small compared with the costs of replacing the original equipment.

Whether such considerations in fact apply in this case, they surely are possibilities in other cases.[14] Accordingly,

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propositions, taken together, suggest that petitioner may indeed have appreciable market power in the equipment market. Indeed, the record indicates that Kodak's charge for a maintenance contract on one of its copier machines was three times that of Xerox, its largest competitor on an equivalent machine. J.A. at 341. Perhaps trial would show that there is some other explanation—*e.g.*, that Kodak charges sufficiently less for its equipment so that the total life cycle costs, including equipment, parts and service, are about the same as those of competitors. As the record now stands, however, Kodak may well have believed that the profits to be made in the aftermarket were worth the predicted loss of original equipment sales. If so, Kodak's own analysis must have been that it had sufficient market power to engage in supracompetitive pricing in the aftermarket.

[13] Steven C. Salop & Joseph E. Stiglitz, *Bargains and Rip-Offs: A Model of Monopolistically Competitive Price Dispersion*, 44 Rev. of Econ. Stud. 493 (1977).

[14] The above considerations also show that the reliance of petitioner and amici on the "economic implausibility" rule of *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) is misplaced. In their view, respondents' case was implausible because "the proposition that Kodak has market power in the parts market . . . is inconsistent with the fact that Kodak lacks market power in the equipment market." S.G. Br. at 11. In fact, as the above discussion suggests, the only situation in which it would be implausible to posit aftermarket power in the absence of power at

this is yet another reason why it cannot conclusively be presumed that competition at the equipment level prevents the occurrence of significant anticompetitive behavior in the aftermarkets for parts and service.

D. *Purpose To Foreclose the Market.* In this case, the petitioner intended to drive the independent service organizations from the field through its policy of confining its parts to customers who purchase service from Kodak, save only for those who serviced their own equipment.[15] J.A. 91-92; *see also* J.A. at 22, 426-27, 455, 805. Even if competition for new sales of equipment would prevent a

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the equipment level is in the idealized perfect market. The further one gets from that ideal, the more plausible it becomes.

Furthermore, it is noteworthy that the alleged conspiracy in *Matsushita* involved sales by the conspirators at low prices. It made sense for the Court to encourage summary disposition of such a case in order to avoid prolonged litigation that might deprive consumers of the benefit of low prices. Such considerations hardly apply to this case, in which there is evidence, as the lower court found, that petitioner was charging higher prices for service that was of poorer quality than that provided by the independent service organizations. *Image Technical Servs.*, 903 F.2d at 614.

[15] Tying that does not have an immediate effect on aftermarket prices may nonetheless raise antitrust concerns because of the longer-term effects of market foreclosure, which shuts out competitors and defeats the wishes of purchasers who might, for whatever reason, have preferred to purchase from a different vendor on different terms. Thus, the Court in *Jefferson Parish Hospital* found that even if the tying seller was not working towards a monopoly position in the tied product, " 'the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market.' " 466 U.S. at 12-13 n.19 (quoting *Fortner Enters.* v. *United States Steel Corp.*, 394 U.S. 495, 512-14 (1969) (White, J., dissenting)). Justice O'Connor's concurring opinion in *Jefferson Parish* agreed that one of the major purposes of tying law is "to identify and control those tie-ins that have a demonstrable exclusionary impact in the tied-product market." 466 U.S. at 35 (citing *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 605 (1953)). As Justice O'Connor also noted, "[t]he antitrust law is properly concerned with tying" when power in the tying market is used to gain additional power in the tied market "by driving out competing sellers." 466 U.S. at 36-37.

manufacturer from engaging in supracompetitive pricing in aftermarkets, it does not follow that such competition would also prevent the manufacturer from engaging in tactics designed to foreclose competitors in the aftermarkets. It may be difficult for a customer of equipment intended to be used for many years to put a price tag on the foreclosure of competitive service providers from the market. As this Court said in *Jefferson Parish Hospital*, 466 U.S. at 15 n.24, "Especially where market imperfections exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement . . . ." The manufacturer may be content to have eliminated the customers' option to choose another vendor, or might deem it wise to postpone price increases until well after the independents are driven from the field. By that time, without the independents' prices to provide the customer with a basis for comparison, there may be little reason to expect that the higher aftermarket prices will cause customers to turn to alternative equipment competitors.

These are but illustrative of facts that would tend to disprove a claim that competition for original equipment sales in a particular industry precludes significant anticompetitive behavior in the aftermarket. Some such facts may be specific to particular industries. In the automobile industry, one such fact is that the immediate victims of any action by a manufacturer precluding use of independently-made crash parts for the repair of its automobiles will be the insurance industry and the crash parts manufacturers, which have no power to decide what car the customer should buy.

III. COMPETITION FOR SALE OF NEW AUTOMOBILES DOES NOT PREVENT EXPLOITATION OF PARTS AND SERVICE AFTERMARKETS

Petitioner's argument—that it does not matter what aftermarkets a manufacturer tries to monopolize, so long as it lacks market power over equipment sales, J.A. at

688—simply makes no sense when applied to the automobile repair aftermarket, as the facts set forth below show. Those facts also show that acceptance of petitioner's argument would have serious consequences for automobile insurers and their policyholders, because automobile manufacturers would see such acceptance as a green light to move toward a long-sought objective, the restoration of their monopoly over crash parts.[16]

A. Competition in the Manufacture of Crash Parts Has Resulted in Significantly Lower Parts Costs

Insurance companies have a major stake in a competitive crash parts market. Automobile insurance companies account for most of the approximately $9 billion worth of crash parts purchased annually in the United States.[17] Automobile insurers pay for more than 75% of all such parts sold,[18] which are installed by repair shops that are part of an immense service network for automobile re-

[16] The automobile companies have unsuccessfully tried to secure this objective through legislation. *See Industrial Design Protection: Hearings on H.R. 902, H.R. 3017, and H.R. 3499 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 403-04 (1990) [hereinafter *House Hearings*] (statement of Donald A. Randall, Washington Representative, Automotive Service Association); *see also* James F. Fitzpatrick, *Industrial Design Protection and Competition in Automobile Replacement Parts—Back to Monopoly Profits?*, 19 U. Balt. L. Rev. 233 (Fall 1989/Winter 1990); David Brooks, *The Sheet Metal War*, Nashville Automotive Report, Feb. 1991, at 4.

[17] *House Hearings*, *supra* note 16, at 218 (statement of C.A. Ingham, Vice President and General Counsel, State Farm Mutual Automobile Insurance Company).

[18] Some insurers are the actual purchasers of the parts; others simply pay the repair shop or reimburse the automobile owner for the cost of such parts. There is no substantive difference between these transactions. We use the generic term "purchase" in this brief because that is the economic reality of these transactions, regardless of form.

pairs—over 360,000 establishments generating $27 billion in revenues.[19] Over 90% of the service outlets for automobile repair and maintenance are independent repair shops, service stations, and garages; they account for 75% of the crash repair business. The remainder is performed by franchised automobile dealers.

Until very recently, the automobile manufacturers were the only sources of crash parts. In the early 1980s, others began to produce and sell crash parts for popular makes and models.[20] These competitive parts were offered for sale in the United States at prices below those for the equivalent parts produced and sold by the original equipment manufacturers ("OEMs").[21] Gradually, over the years, more and more competitive crash parts have made their way to the American market for the repair of crash-damaged vehicles. While the effect of these competitive parts on the market for repairs has been dramatic, the insurance company amici estimate that some 25,000 out of a total of 200,000 crash parts, only one of eight, are currently available from independent sources. Thus, the OEMs continue to be the sole source for most crash parts. In almost no case is it possible to repair a crash-damaged vehicle without the use of some OEM parts.

By and large, independent manufacturers of crash parts sell them to independent repair shops. The automobile manufacturers have discouraged their franchised dealers from using competitive crash parts.

The advent in the United States of competitive crash parts has substantially reduced the price of such parts.

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[19] *House Hearings, supra* note 16, at 403, 418 (statement of Donald A. Randall, Washington Representative, Automotive Service Association); *see also* Automotive Parts & Accessories Association, *1991 APAA Aftermarket Fact Book* 6.

[20] *House Hearings, supra* note 16, at 219-20 (statement of C.A. Ingham).

[21] *Id.* at 220.

Studies have shown that between 1970 and 1980, before competition arose, OEMs increased prices for their crash parts at a rate that exceeded inflation.[22] After competition was introduced, the upward trend in prices was halted.[23]

This competition in the crash parts market has not only provided lower-priced alternatives to OEM parts, but has restricted OEMs' pricing freedom with respect to their own parts when there is a competitive alternative. OEM parts prices were reduced in response to the prices of competitive parts, but the prices of competitive parts were reduced to even lower levels. For example, in 1983, Honda charged $151 [24] for a 1980 Accord fender. In 1983, competing manufacturers began to sell fenders for the repair of the 1980 Accord in the U.S. market for $114.[25] Both Honda and the competing manufacturers successively reduced their prices. By 1989, competition had forced Honda to reduce the price of a 1980 Accord fender to $93 [26]—38% below the price in 1983.

In contrast, Honda in 1983 charged $110 for a replacement front door for the same model 1980 Accord and by 1989 increased its price to $159—45% more than the cost of the part in 1983.[27] No independent manufacturer has sold an Accord door in the U.S. market.

As shown in Table 1, *see* Appendix, the development of competition in the manufacture and sale of crash parts

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[22] *Id.* at 220-21. *See also In re General Motors Corp.*, 99 F.T.C. 464, 584 (1982) (finding that automakers had "unfettered pricing discretion" in the repair parts aftermarket).

[23] *House Hearings, supra* note 16, at 769 (submission of Claude Barfield, Director, Trade Policy Studies, American Enterprise Institute (State Farm and Allstate) [hereinafter *Barfield Report*]),

[24] *Id.* at 779.

[25] *Id.*

[26] *Id.*

[27] *Id.*

produced similar savings benefits for the vehicles of virtually all major automobile manufacturers. It is estimated that the existence of competition in the manufacture and sale of crash parts currently saves U.S. automobile insurance companies and their policyholders some $400 million per year,[28] and the savings are growing year by year.[29]

B. The Automobile Industry's Likely Response if Petitioner's Argument Is Accepted Would Be To Eliminate Competition from Independent Crash Parts Manufacturers

Manufacturers of automobiles have historically followed nearly identical policies and practices with respect to the manufacture and distribution of crash parts. If freed by petitioner's proposed rule of all antitrust law constraints in the aftermarket, it must be anticipated that they will all seek to rid themselves of competition in the sale of crash parts by various techniques. For example, each might forbid its franchised dealers from selling OEM parts to independent repair shops unless the latter agreed to install those parts only in conjunction with other OEM parts—*i.e.*, unless the independent repair shops agreed not to use competitively manufactured crash parts in the repair of the manufacturer's cars. The MVMA amicus brief practically says as much. MVMA Br. at 9-10. In

[28] *Barfield Report*, *supra* note 23, at 786. This $400 million figure is a conservative assessment of the savings resulting from the advent of competition in the crash parts market. It reflects only those savings resulting from insurers' use of independently manufactured crash parts. This figure does not include the significant additional savings attributable to OEM reduction of the prices of their own parts to meet the competition. *See* Appendix, Chart I.

[29] Given the magnitude of these savings, it seems bizarre to suggest, as the MVMA does in its brief, that consumers' welfare would be better served by adoption of the petitioner's proposed rule. *See* MVMA Br. at 11, 14. (For discussion of the impact of petitioner's proposed rule on consumers, see *Brief Amicus Curiae of Public Citizen*.)

a possible variation of this tying arrangement, the automobile manufacturers might decide to continue to give a functional discount on prices for OEM parts for the benefit of independent repair shops,[30] but on condition that the latter agree to use these parts only in conjunction with the installation of other OEM parts.[31]

If permitted by this Court's adoption of the rule advanced by petitioner and its amici, such actions by manufacturers to kill aftermarket parts competition are likely to succeed, because most of the 45 million vehicles damaged in accidents each year[32] require replacement of crash parts for which there are no competitive alternatives. If independent repair shops can secure needed OEM parts only by agreeing not to use any independently-made parts in repairing the manufacturer's cars, they will have no practical choice but to submit, thus eliminating the demand for competitive crash parts.[33]

Given the enormous financial incentives involved, one must realistically expect that all MVMA members would follow suit. The result would be the crippling of the independent crash parts business. Competition from those

[30] Some automobile manufacturers, under pressure from the Federal Trade Commission, grant "functional discounts" on prices of parts purchased by their dealers for resale purposes to enable independent repair shops to compete for repair business with the franchised dealers. In effect, the manufacturers grant a discount to franchised dealers on parts the dealer resells to independent repair shops. *In re General Motors Corp.*, 99 F.T.C. at 470.

[31] Similarly, an automobile manufacturer might so condition its warranty on the car's drive train as to force the owner to use OEM parts exclusively, even on parts outside the scope of the warranty—*e.g.*, crash parts.

[32] *House Hearings*, *supra* note 16, at 418 (statement of Donald A. Randall).

[33] Indeed, the MVMA brief suggests that it would be perfectly appropriate for manufacturers to garner the entire repair business for their franchised dealers, in order to increase their profitability. MVMA Br. at 10.

manufacturers now produces hundreds of millions of dollars annually in savings for insurance companies and their policyholders.

C. Consumer Response in the New Car Market Will Not Prevent Manufacturers' Anticompetitive Conduct in the Aftermarket

According to the conceptual argument advanced by petitioner and its amici, the disciplinary effect of sales competition for new cars guarantees that the above scenarios cannot happen. In light of the above facts, that argument lacks economic plausibility.[34]

First, the "disciplinary effect" theory fails because in this industry, as we have shown, those with the greatest incentive to exert such an influence upon automobile manufacturers will be the insurance companies and the independent crash parts producers, which have no power over the policyholder's choice of a car.[35] Conversely, automobile buyers' incentives to discipline manufacturers are reduced to the extent that the buyers expect such costs to be covered by insurance. Thus, aftermarket tactics to foreclose crash parts competitors do not impact on competition in the sale of automobiles. Petitioner's chain of reasoning snaps at its most critical point.

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[34] The British Monopolies and Mergers Commission rejected a similar argument. In their investigation of Ford's policy not to grant licenses to manufacture or sell crash parts for Ford vehicles, the Commission found that "the public interest in competition in the sale of replacement parts is not satisfied merely by the existence of competition between car manufacturers at the point at which a new car is sold." The Monopolies & Mergers Comm'n, *Ford Motor Company Limited* 39 (presented to the U.K. Parliament Feb. 1985) (a report on the policy and practice of Ford Motor Co., Ltd. of not granting licenses to manufacture or sell in the U.K. certain replacement body parts for Ford vehicles).

[35] Some insurance companies charge different premiums for different cars but these reflect many factors, such as differences in prices, frequency of accidents and theft rates, not merely the cost of competitive crash parts.

The plain fact is that insurance companies, rather than automobile owners, are the consumers of crash parts and crash repair services. Accordingly, it is the insurance industry that is chiefly concerned about the cost of crash parts and crash repair services. As a practical matter, of course, the increased repair costs will eventually be borne by all those who carry property damage and physical damage liability insurance, whether or not their cars are ever involved in a collision. Thus, the effect of any particular manufacturer's activities in the aftermarket to foreclose competition from independent crash parts manufacturers will be spread among all automobile owners who have such insurance. The increases in insurance premiums due to costs of crash parts will be diluted and remote in time from the critical automobile purchase decision as to lack any significant disciplinary impact upon the automobile manufacturer.

Second, those in the market for a new car would in any event find it impossible to factor the cost of the destruction of crash parts competition into their purchase decisions.[36] Crash parts represent a huge dollar volume in the aggregate, but constitute only a small percentage of the total replaceable parts on an average automobile. The buyer would have no way of knowing in advance which crash parts of the automobile he or she might need and which are or will be subject to such competition be-

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[36] The MVMA claims that "purchasers of automobiles and trucks, like the purchasers of Kodak copiers, know that replacement parts and service will be required from time to time, and they take this into account when they make their purchase decisions." MVMA Br. at 4. If this is meant to represent that consumers carefully calculate the likely cost of repairs (including crash parts) as well as maintenance and hard parts over the life cycle of the automobiles, we suggest that this defies conventional experience. It is also inconsistent with the FTC's finding in *In re General Motors Corp.*, 99 F.T.C. at 483, that "[a]ccident repair costs are of little, if any, importance to most purchasers buying an automobile since they believe their insurance will cover damage expenses above the deductible amount." At best, consumers have only a generalized concern over, and knowledge of, maintenance and repair costs.

tween the car manufacturer and independents. Nor can the buyer know whether the other driver in an accident will in any event have to pay for the costs.

In short, there is no way that an automobile buyer who may be aware of the manufacturer's actions to destroy the independent crash parts business could have any idea of how much such actions will cost that buyer. Without such consumer awareness, the argument that new sales competition will prevent a manufacturer from adopting such a parts policy simply falls apart. Certainly, in a case challenging such a parts policy, the plaintiff should not be precluded from submitting proof that consumers lack knowledge and that the manufacturer's anticompetitive policies in aftermarkets are therefore unlikely to cause a loss of new equipment sales.

Finally, where will the putative angry buyer turn? Given a green light to engage in any available anticompetitive practice in the aftermarket, it is likely that most major automobile manufacturers will follow the same policy, since all have the same concern over the extent to which the independent crash parts business has cut into their profits.[37] With parallel behavior among OEMs in the aftermarket, any given manufacturer may cheerfully take aim at the independent crash parts makers, confident that this will not cause loss of new car sales. Once again, then, there is no basis for a conclusive presumption that competition for new sales acts as a deterrent upon the manufacturer's aftermarket policies.

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[37] "Many car dealerships rely on parts and service sales for a large part of their profits, especially with car sales down and car manufacturing capacity in this country alone estimated at as many as two million more buildable vehicles than the market can absorb. In short, sheet metal sales and body shop service dollars are keeping many dealerships' front doors open. They can ill afford to lose profit margins because of increased competition from low cost suppliers." Brooks, *supra* note 16, at 4.

For all these reasons, the Court should decline to announce the sweeping rule that petitioner, the Solicitor General, the MVMA and other amici seek. To the contrary, plaintiffs should remain free to demonstrate that, in the factual context of the particular industry involved, a lack of market power over equipment sales does not prevent the manufacturer from engaging in significant anticompetitive conduct in related aftermarkets.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

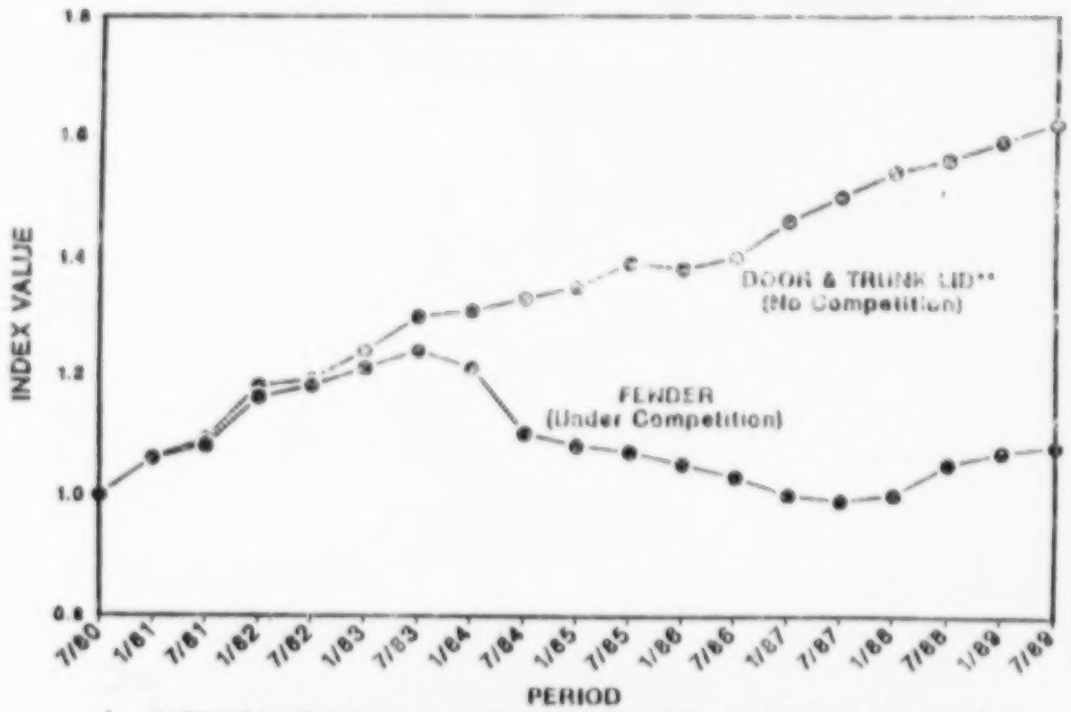
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APPENDIX

Chart I

Reprinted from *Barfield Report*, *supra* note 23, at 776.

INDIVIDUAL CRASH PART PRICES ACROSS MODELS: OEM PARTS UNDER COMPETITION COMPARED TO OEM PARTS NOT UNDER COMPETITION*



* Indices based on thirty-one car and truck models. Existence of competition determined by KEYSTONE CRASH PARTS DIGEST. OEM prices taken from MITCHELL MANUAL & COLLISION ESTIMATING GUIDES.

** Body side panel and tail gate prices were used for trucks.

Source: State Farm Research

Table I

Auto Manufacturer Crash Part Pricing: Impact of Aftermarket Competition
* denotes introduction of competition

Crash Part	Auto Manufacturers' Prices[1]							Competitor Price[2]		% Change in OEM Pricing 1983-1989
	1983	1984	1985	1986	1987	1988	1989	Intro	1989	
FENDER										
1980 Chevette	$ 129*	$ 94	$ 75	$ 71	$ 71	$ 71	$ 71	$ 96	$ 64	-44
1980 Accord	151*	151	75	73	83	86	93	114	80	-38
1981 Escort	82*	64	64	64	63	66	66	70	59	-20
1980 Challenger	181	181	190	190	190	195	195	-	-	8
1980 Corona	141	151	151	151	177	196	196	-	-	39
FRONT DOOR[3]										
1980 Chevette	81	90	90	90	95	95	98	-	-	20
1980 Accord	110	115	115	130	142	146	159	-	-	45
1981 Escort	274	283	312	312	326	341	374	-	-	36
1980 Challenger	368	368	386	386	386	386	400	-	-	9
1980 Corona	220	242	254	255	276	312	327	-	-	49
TRUNK LID[4]										
1980 Chevette	196	198	198	198	220	220	231	-	-	17
1980 Accord	134	140	140	160	181	188	207	-	-	54
1981 Escort	207	214	214	214	224	236	245	-	-	18
1980 Challenger	162	162	170	170	170	170	175	-	-	8
1980 Corona	229	216	257	291	341	380	380	-	-	66

Auto Manufacturer Crash Part Pricing: Impact of Aftermarket Competition
* denotes introduction of competition

Crash Part	Auto Manufacturers' Prices[1]							Competitor Price[2]		% Change in OEM Pricing 1983 - 1989
	1983	1984	1985	1986	1987	1988	1989	Intro	1989	
GRILLE										
1980 Chevette	$ 65	$ 67*	$ 45	$ 43	$ 43	$ 43	$ 43	$ 50	$ 38	-34
1980 Accord	112*	112	54	54	60	62	67	70	58	-40
1981 Escort	60	62	48*	47	47	45	45	52	39	-25
1980 Challenger	211	211	222	222	229	244	248	-	-	18
1980 Corona	68	68	79	79	91	100	95	-	-	40
HOOD										
1980 Chevette	224	231*	161	154	154	154	154	168	111	-31
1980 Accord	140	140	140	136	161	174	189	-	-	35
1981 Escort	208	215*	182	161	161	149	149	160	128	-28
1980 Challenger	222	222	222	222	222	227	235	-	-	6
1980 Corona	162	179	180	181	212	235	235	-	-	45

Source: State Farm Research

* Competition introduced in 1982
[1] Prices are taken from Mitchell's Manuals Collision Estimating Guides.
[2] Prices from Keystone Crash Parts Digest.
[3] Right door of 2-door model selected. If 2-door model not available, right front door of 4-door model was selected.
[4] Hatchback price selected if trunk lid not available.

Reprinted from *Barfield Report, supra* note 23, at 779-80.

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[redacted]

EASTMAN KODAK COMPANY,
Petitioner,
v.
IMAGE TECHNICAL SERVICES, INC., *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

[redacted]
OF
[redacted]
IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit correctly hold that summary judgment by the District Court, in the absence of a full exposition of the factual issues concerning "market power" in the interbrand product market and its relationship to alleged antitrust violations in the parts and service markets, was improperly granted?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 90-1029

EASTMAN KODAK COMPANY,
Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF NATIONAL RETAIL FEDERATION, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

This brief is respectfully submitted on behalf of the National Retail Federation ("NRF") as *amicus curiae*. Pursuant to Rule 37.3 of the rules of this Court, NRF has obtained and filed the written consent of each of the parties to the filing of this brief. NRF supports the position of the Respondents in this case and requests that the decision below be affirmed.

INTEREST OF AMICUS CURIAE

The National Retail Federation is the largest national trade group which speaks for the retail industry. The organization

represents the entire spectrum of retailing, including some twenty-seven national retail associations and fifty state retail associations. NRF's membership represents an industry that encompasses over one million U.S. retail establishments.

As a representative of such a large number of retail establishments, NRF is naturally interested in any litigation involving retail business. Many members of NRF provide replacement parts and service for products sold to their customers as an alternative to manufacturer-owned or authorized service centers. In some rural and isolated areas of the country, repair and parts service offered by these retailers is the only practical alternative for all but the largest customers.

A decision in this case that would establish a universally applicable rule of law favoring total manufacturer control of parts and service for its products, without a full exposition of the pertinent facts at trial, would have widespread damaging effect on the entire parts and service industry, including parts and service offered by retail members of NRF to their customers.

STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. §§ 1 and 2, provides:

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Petitioner, Eastman Kodak Company ("Kodak"), manufactures and sells copiers and micrographic equipment. It also sells service and replacement parts for its machines. Respondents are independent service organizations ("ISOs").

In the early 1980s, ISOs began buying parts from Kodak and competing with it in servicing Kodak machines, sometimes offering significantly lower prices.

In 1985 and 1986 Kodak implemented a policy of selling replacement parts for new micrographic machines only to buyers of Kodak machines who do not purchase repair services from ISOs. Kodak also has a policy of not selling copier parts to ISOs.

Kodak contends that these policies are intended to ensure quality of service for Kodak machines, to reduce its parts inventories and inventory costs and prevent ISOs from free-riding on Kodak's investments.

In 1987, a number of ISOs brought this action, alleging that Kodak had unlawfully tied the sale and service of Kodak

machines to the sale of parts and had unlawfully attempted to monopolize the sale of service for Kodak machines in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

After abbreviated discovery, the District Court granted summary judgment for Kodak, upon finding no evidence of a tying arrangement and finding that Kodak, without monopoly power in the equipment market, had a natural monopoly over the parts it sells under its name.

The 9th Circuit reversed this decision and remanded the case for trial. It held that an unlawful tying agreement could exist if Kodak had sufficient economic power in the tying market.

The Circuit Court held that there were genuine issues of fact concerning the questions of market power and market definition to preclude summary judgment.

The Court of Appeals also found evidence to support a finding that Kodak's implementation of its parts policy was anticompetitive and exclusionary and, therefore, sufficient to withstand summary judgment on the monopoly claim.

The Petitioner filed a Petition for a Writ of Certiorari in this Court. On June 17, 1991, this Court agreed to hear Petitioner's appeal.

SUMMARY OF THE ARGUMENT

The Petitioner and its *amicus* supporters are incorrect in asserting that, on the basis of the very limited facts presented in this case, it can be determined on summary judgment that Petitioner lacks the market power necessary to establish violations of sections 1 and 2 of the Sherman Act. Petitioner is also incorrect in asserting that if it does lack market power in the interbrand product market, it necessarily cannot have

violated either section 1 or 2 of the Sherman Act in any aftermarket (such as parts and service which are the subject of this case). Furthermore, an affirmation of the District Court's summary judgment in this case on a bare bones record, supported by questionable legal inferences derived from questionable economic assumptions, would establish legal principles for the entire product service industry which could have a truly devastating effect on the ability of independent service organizations, in all fields including retailing, to compete for replacement parts and service business. This would only result in higher prices for consumers.

ARGUMENT

I. THE GRANT OF SUMMARY JUDGMENT IN THIS CASE WAS PREMATURE. THE PETITIONER'S POSITION ON SUMMARY JUDGMENT DEPENDS ON A NUMBER OF ECONOMIC ASSUMPTIONS WHICH REQUIRE EVIDENTIARY SUPPORT.

Although much time has passed since this Court expressed its skepticism about granting summary judgments in antitrust cases, *Poller vs. Columbia Broadcasting System*, (368 U.S. 464 (1962), summary judgment still may not be granted where genuine issues of fact remain to be resolved. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) did not decide otherwise. In that action, after years of discovery and the production of millions of documents, summary judgment was entered when plaintiffs were unable to produce any direct evidence of the alleged predatory pricing conspiracy. The favorable inferences Plaintiff attempted to draw from that extensive record were found by this Court to be implausible "as a matter of common observation." *Id.* at

587. In this case, the Respondents were allowed only limited discovery and the inferences which they attempt to draw from the limited facts as outlined in their brief are no less "plausible" than the inferences sought to be drawn from the same facts by the Petitioner. All relevant facts to determine whether lack of market power in the interbrand product market precludes unlawful practices in the parts and service aftermarket, upon which the premise of Petitioner's argument rests, remain unexplored in this summary judgment decision.

Nothing in the *Matsushita* decision suggests that where plaintiffs, such as Respondents, produce evidence to suggest a violation, a court can substitute its own inference about the credibility of the evidence, in effect taking the case from a jury. See *In re Coordinated Pretrial Proceedings in Petroleum Products Litigation*, 906 F.2d 432, 438 (9th cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991). It is still the law that all factual doubts in determining a summary judgment motion must be resolved against the moving party, in this case the Petitioner, *United States v. Diebold*, 369 U.S. 654, 655 (1962), after development of an adequate record. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The Ninth Circuit recognized that the propositions advanced by Petitioner, essentially without support in the record (i.e., that it does not possess market power in the interbrand product market, and that its alleged lack of market power in the interbrand product market *ipso facto* renders lawful any competitive activity in the parts and service aftermarket), could not properly be the basis of a summary judgment, in view of the fact that other facts cited by the Respondents point contrariwise. (For example, as pointed out by the Respondents, the markets for certain Kodak copier and micrographic equipment could be considered "highly concentrated." Also, the motivation of consumers in buying products in the interbrand market may not reflect a consideration of availability or costs

of parts and services. Information as to such availability or costs may not be known to customers at the time they purchase equipment.)

II. THERE WAS SUFFICIENT AMBIGUITY IN THE EVIDENCE OFFERED ON PETITIONER'S ECONOMIC POWER IN THE PARTS AND SERVICE AFTERMARKET TO PRECLUDE SUMMARY JUDGMENT.

Petitioner in attempting to reverse the decision of the Court of Appeals argues the principle that lack of market power in the interbrand product market precludes the possibility of unlawful tying or monopolization in the parts and service aftermarket. (The Solicitor General, in his *amicus* brief, appears to have altered that proposition to state that the non-existence of "monopoly power" in the product market precludes a tying or monopolization violation in aftermarkets.)

First of all, as stated above, there is an insufficient record in this case upon which to assume the non-existence of "market power" in the interbrand product market or aftermarket.

Secondly, the test for "market power" in a tying case is not the same, nor is as rigid, as that required to show "monopoly power." This Court made it clear in *Jefferson Parish Hospital District #2 v. Hyde*, 466 U.S. 2 (1984), that the "market power" needed to establish a ***per se*** tying claim can be supported by a showing of some unique characteristic that makes anti-competitive forcing likely. *Ibid*, pages 16-17. See also *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-503 (1969).

Even if the requisite "market power" (as distinguished from "monopoly power") is not possessed by Petitioner in the interbrand product market, the existence of "market power"

by Petitioner in the parts aftermarket could, under certain factual circumstances, be sufficient to establish a tying violation as to service. See *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936). A number of consumer economic behavioral theories are cited in the *amicus* briefs of the state attorneys general, Public Citizen and others concerning the choice of a parts and service seller as opposed to the choice of product. These theories cast significant doubt on the proposition that lack of market power in the interbrand product market necessarily precludes unlawful tying or monopolization in the parts and service market and strongly suggests the need for a full examination of these issues at trial.

CONCLUSION

The Court of Appeals correctly decided that a finding of a broadly applicable law of *per se* legality permitting a manufacturer to completely control the sale and use of parts and services for its products, regardless of the means employed or their competitive effects, merely upon a showing of lack of "market power" in the interbrand product market, was not warranted without a full examination of the issues at trial. Summary judgment, based on a cryptic record from which dubious inferences are drawn, is no basis on which to establish a principle of law having widespread effect on consumers and the entire U.S. service industry, including many members of NRF which offer replacement parts or service to their customers.

Those who insist upon economic efficiency as the sole *raison d'etre* of the antitrust laws cite "consumer welfare" as the ultimate goal of the antitrust laws. An affirmance of the Court of Appeals in this case is required to ensure that the issues raised by this case are fully explored in light of their potential negative effect on the consumer welfare and the fast growing service industry.

For the reasons stated herein, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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(26)

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OCTOBER TERM, 1991

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF THE NATIONAL OFFICE MACHINE DEALERS ASSOCIATION AND THE NATIONAL ASSOCIATION OF SERVICE DEALERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an equipment manufacturer, lacking sufficient market power in the interbrand market of equipment sales, can possess market power in the parts and service segment of the industry.

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IMAGE TECHNICAL SERVICE, INC.; J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICRO-GRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, D/B/A G & S ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, D/B/A MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO, LTD.,

Respondents.

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BRIEF OF THE NATIONAL OFFICE MACHINE DEALERS ASSOCIATION AND THE NATIONAL ASSOCIATION OF SERVICE DEALERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The National Office Machine Dealers Association ("NOMDA") is a national and international organization representing approximately 6,500 independent business equipment and systems dealers. NOMDA is recognized as the major spokesperson for the industry. Premised upon NOMDA's commitment to service and integrity, one of NOMDA's principal organization goals is to assist its members in providing the highest level of pre-sale, point-of-sale, and post-sale support to end-users of sophisticated office products. NOMDA achieves these goals through education and guidance offered to its members over the past sixty-six years.

As a non-profit organization representing business equipment and systems dealers as well as manufacturers, NOMDA has a substantial interest in this litigation. It is NOMDA's position that absent an authorized dealer channel, parts should be made available to qualified technicians for service of end-users' equipment. In simplest terms, the owner of equipment, rather than the manufacturer, should decide who shall service the product. Anything to the contrary is illegal restraint.

This case involves the treatment of this issue under the Sherman Antitrust Act. Eastman Kodak Company ("Kodak") instituted and enforces a policy which effectively prevents *any* independent service organization ("ISO") from obtaining repair parts to be used for service of Kodak equipment in competition with Kodak. Through its refusal to sell parts to ISO's, Kodak has created a monopoly in the service of Kodak equipment by depriving end-users of the ability to choose a service organization. The absence of an authorized dealer channel enables Kodak to maintain a total monopoly on parts and service for Kodak products.

NOMDA's membership contains both ISO's and dealers authorized by a manufacturer to market and service highly technical products to end-users. This Court's decision will affect the ability of end-users to select the source for post-sale support of the products they purchase and the ability of independent service organizations to provide that support. In an already fragile economy, Kodak's practice serves to increase prices and the freedom of end-users to contract for service. Accordingly, NOMDA has a strong interest in the disposition of this case.[1]

---

[1] The parties' letters of consent pursuant to Rule 37 of the Rules of this Court have been filed with the Clerk of the Court.

STATEMENT

The Respondents in this case are ten ISO's who compete for service for all brands of micrographic and copier equipment. The ISO's competitor, Kodak, manufactures the equipment and directly markets the equipment, parts and service to end-users. The ISO's do not seek the right to sell Kodak equipment, only to service such equipment as requested by owners of that equipment.

Prior to 1985, ISO's were able to purchase parts from Kodak, at premium prices, pursuant to the policy stated in Kodak's Customer Equipment Service Division. Kodak's former policy provided, "Kodak will sell replacement parts to any party who intends to use them to repair Kodak equipment." JA 435[2] In reliance upon Kodak's policy and their ability to obtain parts, the Respondents went into direct competition with Kodak for the sale of used equipment and service of Kodak equipment.

After losing a substantial amount[3] of service business to the competitive ISO's, Kodak implemented a change in its "Replacement Parts Principles" by eliminating the commitment to "sell replacement parts to any party who intends to use them to repair Kodak equipment." JA 435. Kodak further modified its terms of sale by limiting sales to the "dealers, distributors, and service outlets" which were "Kodak authorized."[4] Brief for Appellants at 14, *Image Technical Service* v. *Kodak*, 903 F.2d 612 (1988) No. 88-2686. Kodak's policy of distributing parts to "Kodak authorized" dealers and distributors effectively means only direct distribution by Kodak, which unlike its competitors does not include "authorized dealers." Kodak's policy change insulates Kodak from all competitive forces for service of Kodak equipment through the

---

[2] See e.g., Joint Appendix ("JA"). Documents lodged with the Clerk "L".

[3] In 1986, ISO's provided service to a number of large governmental and non-governmental entities; ISO customers included: Internal Revenue Service, U.S. Department of Agriculture, U.S. Veterans Administration, State of California, Commercial Trust, State Farm Insurance, Blue Cross Blue Shield of Minnesota, Dow Chemical, Mobil Oil, Pennzoil, Bechtel Corporation and Northern Pacific Railway. JA 488, 492-93, JA 546, 501, L 149-50, L 165. In addition, ISO's provided service to a wide range of less recognized Kodak equipment customers.

[4] The term "authorized" implies a distributor or dealer who is trained by a manufacturer to provide pre-sale, point-of-sale, and post-sale support to customers.

elimination of the ISO's source of parts and denies the benefits of competition to Kodak end-users.

In 1987, the ISO's brought suit against Kodak alleging violation of Sections 1 and 2 of the Sherman Antitrust Act. Specificaliy, Respondents allege Kodak is engaging in a *per ser* illegal tie-in arrangement through its refusal to sell parts to end-users unless the end-user agrees not to utilize the services of an ISO. Respondents also allege Kodak created a monopoly through their refusal to sell parts to ISO's, effectively eliminating all competition in the service market for Kodak manufactured equipment.

After filing their complaint in the District Court, Kodak filed a Motion for Summary Judgment. Following a brief and limited period of discovery, and without oral argument, Judge Schwartz granted Kodak's Motion for Summary Judgment. In his opinion, Judge Schwartz stated, "A Kodak customer...can buy parts if he simply owns Kodak equipment." *Image Technical Service, Inc.* v. *Eastman Kodak Co.*, No. C-87-1686 WWS at 5 (1988). Judge Schwartz' ruling and factual interpretation of the limited facts available at the summary judgment are clearly erroneous. The ISO's showed availability of parts was conditioned on the Kodak customer agreeing not to use an ISO for service of equipment. JA 428-29, L 140, L 143. Kodak repeatedly warned customers of the ISO's inability to purchase parts and the likely prospect of not obtaining service from ISO's. JA 465.

Respondent ISO's appealed Judge Schwartz's decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed and remanded the case to the District Court, ruling the ISO's had presented sufficient evidence to withstand summary judgment. The Court of Appeals correctly found Kodak may have monopoly power in the interbrand market for parts and service which may have eliminated competition in the relevant market. While the Court of Appeals correctly found issues of fact existed, its decision mistakenly relied on Kodak's interpretation of the facts. Kodak alleged Respondents had conceded that equipment consumers consider the cost of parts and service when determining which brand of equipment to purchase. JA 823, JA 779-80. Kodak also alleged, and the Court of Appeals adopted the position, that Respondents acknowledged the fact that Kodak lacks market power in the interbrand market for equipment sales. Neither concession was made by Respondent in its brief or oral argument.

The Ninth Circuit noted interbrand competition in the equipment market may not negate the ISO's claim that Kodak has monopoly power in the parts market. (See, e.g. *Dimidowich* v. *Bell & Howell*, 803 F.2d 1473, 1480, n.3 (1986), modified 810 F.2d 1517 (1987), *Digidyne Corp.* v. *Data General Corp.*, 734 F.2d 1336, 1339 (1984).) The Ninth Circuit concluded the District Court's lack of consideration of the issue of market power prevented the trial court from being able to determine whether Kodak had monopoly power. Based on the limited evidence presented, the Ninth Circuit found it unlikely that Kodak's limited presence in the interbrand market precluded a finding of monopoly power in the parts market.

SUMMARY OF ARGUMENT

Because independent dealers are a key link in the chain of product distribution, the sales practices they adopt greatly affect the competitiveness of the market, manufacturer sales levels, and end-user satisfaction with their purchases. Dealers, as their name implies, are authorized by manufacturers to offer pre-sale, point-of-sale, and post-sale support for a manufacturer's product. In order to be authorized, a dealer is trained by a manufacturer or third party in the proper sale, service, and support of business equipment. ISO's are also trained on equipment either by a manufacturer as a technician or as an authorized dealer for a competing brand of equipment. An ISO network often is established where no authorized dealer channel exists or merely as an alternative to an authorized channel.

Most dealer appointments are non-exclusive, resulting in the dealer competing with other authorized dealers, as well as the direct marketing branch of the manufacturer, creating significant intrabrand as well as interbrand competition.

ISO's and authorized dealers provide significant intrabrand competition in the technologically complex business equipment and systems marketplace. Intrabrand competition affords an end-user a choice of service provided either by a dealer or the manufacturer. If a dealer offers non-competitive pricing or unsatisfactory service, the end-user should not be locked into one source for aftermarket service and support. Intrabrand competition benefits both end-users, who receive better service at lower prices, as well as dealers who add valuable services to the economy.

The absence of an authorized dealer channel eliminates this intrabrand competition. Kodak eliminated all intrabrand competition through its refusal to sell parts to customers who choose to use

ISO's. The ISO's presence created desired intrabrand competition, resulting in lowered Kodak service prices and improved service in those instances where ISO's and Kodak directly competed.[5]

All manufacturers have an interest in the proper maintenance of equipment after it is sold. ISO's have an equal interest in proper maintenance for it is the very foundation of their success. A service provider makes a substantial investment to establish and maintain a business and will not risk that investment through inferior service. Most importantly the end-user benefits from the freedom to choose who shall maintain the complex equipment owned.

For these reasons, it is appropriate to enforce *per se* liability rules to determine the legality of Kodak's tying arrangement. Kodak's blatant attempt to eliminate the ISO's from the service aftermarket by refusing to sell parts to end-users who choose ISO service allows Kodak to maintain a monopoly through an illegal tying arrangement. This tying arrangement prohibits competition in the parts and service after-markets.

ARGUMENT

The Ninth Circuit found sufficient basis to reverse the District Court's decision granting summary judgment. Respondents successfully presented triable issues of fact which remain disputed between the parties. The central issue in this case is whether an equipment manufacturer, lacking sufficient market power in the interbrand market of equipment sales, can possess market power in the parts and service segment of the industry. Respondents contend parts and service are separate markets from equipment sales where Kodak maintains monopoly power through the implementation of its tie-in arrangement. Kodak's policy has permitted them to establish prices without restraint and eliminate competition by refusing to sell the parts required to service the product.

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[5] The record and Court of Appeals recognized that service prices declined in those cases where Kodak directly competed against an ISO for service. *Image Technical Service, Inc.* v. *Eastman Kodak Co.*, 903 F.2d 612, 617 (1990).

THE ISO'S PRESENCE IN THE MARKET PROMOTES BOTH INTERBRAND AND INTRABRAND COMPETITION

Providing good service is competitively essential for a manufacturer or distributor of high technology products. Service represents future revenues through renewed maintenance agreements, equipment upgrades, sales of peripherals and future placements of additional equipment. A competitor who is unable to efficiently provide good quality service at affordable prices will soon find their customer seeking alternative sources for service or alternative products.

Many manufacturers choose to offer their products to the public through an authorized dealer channel. Dealers take on various names such as distributor, reseller, remarketer, or value-added reseller but all perform essentially the same duties for the authorizing manufacturer. The dealer channel provides pre-sale, point-of-sale, and post-sale support to the end-user. Dealers and their employees are trained by the manufacturer or a third party to market and support equipment to end-users.

Dealerships, although authorized by a manufacturer, are individual business entities independent from the manufacturer from which they purchase products for distribution. Most dealers are appointed as "non-exclusive". The term "non-exclusive" enables a manufacturer to appoint additional dealers or authorize additional channels of distribution to compete with the existing dealers.[6]

Kodak competitors who, like Kodak, wish to increase their market share of equipment sales, do so through intense interbrand competition among their dealers and intrabrand competition among all channels. Competition is present in distribution at two levels, manufacturers and dealers competing in the interbrand market, i.e. Kodak v. Canon, and dealers competing against other dealers for equipment placement and service in the intrabrand market (i.e. Canon v. Canon).

The vertical and horizontal competition described above also occurs in the parts and service aftermarket for high technology equipment. Intrabrand competition results from one manufacturer and a number of dealers competing to support the equipment sold.

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[6] Full service dealers provide a wide range of products and services to end-users. Discount retailers provide little or no service or support to equipment purchasers.

The dual competition, interbrand and intrabrand, affords an end-user, who is dissatisfied with their service provider, the opportunity to choose another source for service. Intrabrand competition maximizes end-user benefits such as efficient service, low prices and superior customer education. It further allows full market penetration through a number of independently owned and operated dealers competing against each other and their manufacturer for revenues from equipment sale and service.

A few manufacturers, such as Kodak, do not utilize an authorized dealer channel but choose instead to compete in the interbrand market by offering their products directly to the end-user. Kodak's decision to forego the dealer channel and directly market their products is not contested. (See, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 366 (1977), manufacturer refuses to sell product to competitor for distribution, *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988) manufacturer terminates dealer in equipment sales.) The right to directly distribute products cannot be disputed, however, this right cannot be transferred to aftermarket support of an end-user's equipment. Once sold to an end-user or leasing company, the equipment is no longer Kodak's property to control but becomes the possession of an end-use customer. The principles which support Kodak's right to refuse to deal with a competitor in equipment sales cease to apply. Kodak, through its arrangement of tying parts to service, attempts to extend its right to refuse to deal with competitors in equipment sales to its refusal to sell parts to ISO's. The refusal to sell parts to end-users, unless they agree not to use another service provider, results in a *per se* illegal tying arrangement.

MARKET SEPARATION OF PARTS AND SERVICE UNDER *JEFFERSON PARISH*

To determine whether a *per se* tying arrangement is present, this Court must first ascertain whether separate markets exist for the sale of equipment and the sale of parts and service. Kodak argues the sale of equipment encompasses the aftermarket sale of parts and service for Kodak equipment as derivative markets. In order to dispel this argument, the relative markets in which equipment, parts and service are sold must be considered. To assist in determining whether a tying arrangement is anti-competitive, this Court has considered whether "two separate products may be tied together and, if so, whether they have used their market power to

force" acceptance of the tying arrangement. *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2, 18 (1984). The establishment of separate markets for each of the products is essential to establish Kodak has used its market power in parts to force Kodak end-users to purchase Kodak service.

A. Characteristics of Demand

To determine whether one or two products are involved in a tying arrangement, this Court has reviewed the characteristics of demand for the products. *Id.* at 19. Kodak claims the demand for parts is synonymous with the demand for service. This claim is without merit. Respondents have shown a separate demand for service exists when end-users have requested Kodak parts, but not requested Kodak service. JA. 428-429. On those occasions where customers made requests for Kodak parts, but not for Kodak service, Kodak agreed to sell the part only if the customer agreed not to use ISO service (i.e., the customer installs the part themselves). Where a customer or an ISO offers to buy a part, with service provided by an ISO, Kodak refused to fill the parts order. JA. 428-429. In implementing its parts policy, Kodak thus recognizes a separate demand for parts and service, and attempts to eliminate the demand. If there was no demand for parts without purchasing Kodak service, Kodak would have no need for a policy conditioning the sale of parts with the sale of Kodak service.[7]

Kodak's current parts policy, enacted on December 1, 1986, illustrates the separate demand for parts and service. Kodak's Terms of Sale provide that parts would only be sold to: "Kodak authorized...dealers, distributors and service outlets" and "other users who purchased equipment directly from Kodak and who service their own machines." Brief for Appellant at 14, *Image Technical Service, Inc.* v. *Kodak*, 903 F. 2d 612 (1990) No. 88-2686. The policy explicitly forbids the sale of parts to an end-user unless the end-user agrees not to use ISO service. The distinction between an end-user who installs his own parts and an end-user who chooses a trained ISO to install that same part is without basis and irrational. The distinction confirms the ISO's argument that a separate market for parts and service exists.

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[7] The separation of parts and service was acknowledged by Judge Wiggins in his majority opinion for the Ninth Circuit. He noted Kodak's policy for parts implied a desire separate from Kodak service, which implies separate markets. *Image Technical Service, Inc.* v. *Eastman Kodak Co.*, 903 F.2d 612, 616 (1990).

Kodak's brief acknowledges the existence of aftermarket Kodak service contracts to customers. Kodak provides service through (1) initial warranty; (2) annual service contracts; or (3) on a "per call" basis.[8] PB at 3. The last two service arrangements are contracted separately from the sale of equipment and therefore, create a separate market after the initial equipment sale. Kodak, by virtue of its manufacture and sale of equipment to the end-user, demands that this Court support the elimination of competition in the equipment support aftermarket. This demand would eliminate intrabrand competition in equipment service.

B. Distinct Product Markets

In *Jefferson Parish,* this Court ruled a tying arrangement may not exist unless there is sufficient demand for the tying product (parts) separate from the tied product (service) to identify a distinct product market in which it is efficient to offer the tying product separate from the tied product. 466 U.S. 2, 22 (1984). By offering to service Kodak equipment, ISO's created a separate demand for Kodak parts exclusive of the demand for Kodak service. The ISO's presence in the service market for service of Kodak equipment creates intrabrand competition for parts and service. Intrabrand competition in turn creates a competitive market for service of equipment for end-users.

Kodak's single-market view of equipment sales encompassing all derivative markets is without merit when viewed in light of commercial realities. In *Dimidowich* v. *Bell & Howell,* the Ninth Circuit correctly recognized the existence of the service aftermarket:

> [A]n owner of broken B & H micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the owner's only option is to request service from B & H or Comgraphic (depending on location) [both B & H repairers], that is obviously the market the owner faces. 803 F.2d 1473, 1481 n.3 (1986).

Market realities dictate demand in the three separate markets: the new equipment market; the parts market; and the service market. The demand in each of these markets is separate and distinct, as illustrated by Kodak equipment end-users' request for ISO service on their Kodak equipment. JA 411, JA 449, JA 462, JA 470-71, JA 504. End-users should continue to have the freedom they once

[8] See e.g. Petitioner's Brief "PB".

enjoyed to select the service entity of their choice without Kodak's exercise of its monopoly power.

KODAK'S MARKET POWER IN PARTS AND SERVICE NEGATIVELY AFFECTS COMPETITION

In *Jefferson Parish,* this Court acknowledged the legality of offering two distinguishable services in a single transaction. 466 U.S. 2, 24 (1984). This Court concluded that, had the patients in *Jefferson Parish* been forced to purchase the services of a particular anesthesiologist (tying product) as a result of the hospital's market power, the arrangement would be considered anti-competitive. The patients in *Jefferson Parish* were able to choose another anesthesiologist if they desired. It is in this concept that distinguishes this case from *Jefferson Parish.* Respondents in this case have shown Kodak's policy to sell parts only to those customers who agree not to use ISO service has resulted in Kodak equipment user's purchase of Kodak service. Unlike the patients in *Jefferson Parish,* Kodak end-users have no choice.

Kodak's market power in parts forces the end-user to purchase the tied product, Kodak service. Unlike the tie-in in *Jefferson Parish,* Kodak's parts policy directly forecloses all competition for service of Kodak equipment. In *Jefferson Parish,* this Court correctly found the hospital had no relevant market power, as a patient could go to another hospital or another anesthesiologist if they did not want the anesthesiology services offered by the petitioner. Here, Kodak end-users are foreclosed from using any other service provider *except* Kodak, due to Kodak's market power in parts and service.

Kodak has forced its end-users to accept a tie which is anticompetitive and unprotected in light of *Jefferson Parish.* This Court stated, "tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made." *Id.* at 27. Unlike the patients in *Jefferson Parish,* Kodak customers have no choice of service provider after they purchase Kodak equipment. Due to Kodak's elimination of ISO's as contenders in the intrabrand market, and Kodak's failure to authorize a dealer channel for service support, no alternative service provider exits. The market effect of Kodak's tying arrangement eliminates any competition in the Kodak equipment support aftermarket thus forcing an end-user to purchase Kodak service when the end-user would prefer to buy Kodak parts for installation by another.

Respondents have shown the effect of Kodak's "forcing" through limited discovery conducted in this case, which indicated end-users were prevented from choosing ISO's equipment service once ISO's were unable to purchase parts. JA 465. Unlike the Petitioner's policy in *Jefferson Parish*, Kodak's tying arrangement significantly restrains the end-users' freedom to select a specific service provider through the elimination of any choice in the service market.

The recognition that some competitive advantages are justifiable in light of the competitive ideal has been established throughout recent antitrust precedents. In its decisions, this Court has noted when a seller's power is "used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive measures." *Id.* at 14. Insulation from competitive forces for uniform products are not protected by the Sherman Act. Competition, both interbrand and intrabrand, prevents an inferior product from being protected in the market. Kodak's tying of parts to service has eliminated intrabrand competition and enabled Kodak to market its inferior service to Kodak equipment owners free from the competitive presence of the ISO's. Respondents have offered evidence of superior ISO service when compared to Kodak service. L 133, JA 424-26. Comparative ISO service is not surprising considering most ISO's are factory trained Kodak technicians who were former Kodak employees. Kodak's measures to force ISO's out of the service market insulate Kodak service from ISO competition and helps to maintain their employment of technicians. The ISO's presence forced Kodak to compete on the merits of the services offered. Rather than lowering service prices and competing with ISO's, Kodak chose to curtail competition in order to maintain their profits without ISO interference.

KODAK EQUIPMENT OWNERS SUFFER FROM KODAK'S TYING ARRANGEMENT

To Kodak end-users, the elimination of ISO's from the service market meant increased prices and often inferior service.[9] "The freedom to select the best bargain in the second market is impaired

[9] As acknowledged by the Ninth Circuit, the ISO's provided evidence which showed they provided better quality service at prices less than Kodak. *Image Technical Service* v. *Kodak*, 903 F.2d 612, 617 (1990). Kodak employees also acknowledged the ISO's "good service" of Kodak equipment. Respondent's Brief at 13, L 180.

by a need to purchase the tying product, and the corresponding inability to evaluate the true cost of either product when available only as a package." *Jefferson Parish*, 466 U.S. at 15. Kodak's parts policy effectively eliminates the freedom to select the best choice in the second market. The alternative choice of an ISO for service provided a bargain for consumers, achieved through the competitive prices and service packages offered by ISO's. Intrabrand competition to provide service for Kodak equipment afforded consumers the freedom to choose the "best bargain" of either ISO or Kodak service.

Unlike other recent antitrust cases considered by this Court, this case involves a clear separation of products and the resultant market power necessary to create a tying arrangement causing "economic harm to competition in the tied market." *Id.* at 19, n. 31. The refusal to recognize the existence of an aftermarket for parts and service separate from equipment sales is unreasonable in an economy which is becoming more and more service oriented. Respondents provided evidence to the District Court that the price and quality of the tied product, service, was adversely affected by Kodak's restraint. The evidence offered sufficiently established that some Kodak equipment purchasers were forced to purchase Kodak service due to the anti-competitive effects of Kodak's tying arrangement.

COMPETITION IN THE INTERBRAND EQUIPMENT MARKET DOES NOT PRECLUDE VIOLATION OF THE SHERMAN ACT IN AN AFTERMARKET

The issue most often disputed in this case is the existence of market power — the ability of Kodak to exclude competition and set prices. This question is debated due to the requisite factors needed to establish violations of Sections 1 and 2 of the Sherman Act. This Court has found a tying arrangement is *per se* unreasonable if the defendant has sufficient market power in the tying product market to restrain competition appreciably in the tied product market. *Fortner Enterprises* v. *U.S. Steel Corp.*, 394 U.S. 495 (1969).

Kodak and amici claim Kodak cannot possess market power in the parts and service after-markets due to Kodak's lack of market power in the interbrand equipment sales market. The Ninth Circuit in their majority opinion disagreed with Kodak's position by concluding in reality Kodak could have monopoly power in a single brand market. *Image Technical Service, Inc.* v. *Eastman Kodak*, 903 F.2d 612, 621 (1990). As discussed above, Respondent ISO's have

produced evidence demonstrating the existence of a separate demand for parts created by ISO service of Kodak equipment. The sole fact that ISO's operate as a business concern to service Kodak equipment demonstrates a separate market for parts and service. The ISO's further offer evidence of Kodak's ability to decrease prices in the parts and service aftermarkets where the parties engaged in direct competition. JA 420, JA 422, JA 474-75, JA 482; JA 514.

This Court has held the proper focus of concern hinges on "whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." *Fortner Enterprises, Inc.* v. *U.S. Steel,* 394, U.S. 495, 504 (1969). After considering this fact in light of the evidence offered by Respondents, the Ninth Circuit correctly found the issue of market power created a factual dispute which precluded summary judgment.

Kodak states it controls only a small portion of the interbrand market for the sale of micrographic and copier equipment. The ISO's dispute this statement, contending Kodak does have market power in two of the relevant markets. Kodak's dominance in the high end copier segment is well known. RB at 21-22.[10] Kodak's competitors, Xerox, Savin, Canon, Ricoh, 3M, Bell & Howell and Minolta, each share a portion of the market in the sale of equipment. These manufacturers compete with Kodak for the sale of equipment in the interbrand market. None of Kodak's competitors or their dealers compete with Kodak in the sale of Kodak parts and service for Kodak equipment. The intense interbrand competition that exists in the sale of micrographic and photocopier equipment disappears in the product support aftermarket for Kodak equipment. The aftermarket of support for Kodak equipment is now exclusively controlled by Kodak as a result of the tying arrangement.

LACK OF AN AUTHORIZED DEALER CHANNEL ELIMINATES INTRABRAND COMPETITION AND SECURES KODAK'S MARKET POWER

As NOMDA argued in its amicus brief in support of Respondent Sharp in *Business Electronics Corporation* v. *Sharp,* 485 U.S. 717 (1988), the authorized dealer channel or full service dealer

[10] See e.g. Respondent's Brief "RB".

promotes intrabrand competition, which produces optimum service levels. Factory trained authorized dealers offer pre-sale, point-of-sale and post-sale service in competition with other dealers who market and service a specific brand of equipment. Direct marketers like Kodak and other manufacturers possess a vested interest in the proper maintenance of end-user equipment. Proper maintenance helps assure end-user satisfaction, and a satisfied customer will return for equipment upgrades, new equipment or extended maintenance agreements. It is therefore important to insure proper service is given to protect the goodwill associated with a manufacturer's name.

Both the dealer and manufacturer distribution channels market equipment and service to end-users. After the sale, equipment is installed at a user's location, and ceases being the manufacturer's property and becomes the end-user's property. Without an authorized dealer channel, Kodak customers have two choices for service; the consumer may service equipment themselves or have Kodak provide service. ISO's, when able to purchase Kodak parts, provided a third alternative which maintained intrabrand competition for the service of Kodak equipment.

A dealer who sells equipment but fails to offer competitive service may lose a maintenance contract and the potential for future sales to the manufacturer or another authorized dealer. Alternatively, intrabrand competition allows a dealer who did not competitively price equipment for sale the opportunity to market a service agreement to a end-user who purchased equipment elsewhere. Intrabrand competition allows them to purchase equipment from one dealer and service from another, thereby using market forces to achieve the best value for the their money.

The effect of Kodak's tie-in arrangement results in stifled intrabrand competition in the Kodak aftermarket for service and eliminates the end-user's freedom to choose. Prior to Kodak's policy change, ISO's provided end-users a much needed selection of service providers. The ISO's provided competent service to Kodak equipment owners in order to secure future service revenue. The intrabrand competition which resulted from ISO competition continued without interruption until Kodak began to lose service profits to the highly competitive ISO's. Kodak then instituted its tie-in arrangement to recapture service profits through the elimination of intrabrand service competition. Kodak ended the end-users right to choose and replaced it with its own.

Kodak's effective elimination of competition in the intrabrand market affords Kodak market power in the parts and service aftermarkets. This Court has condemned tying arrangements "when the seller has some special ability — usually called 'market power' — to force a purchaser to do something he would not do in a competitive market." *Jefferson Parish*, 466 U. S. at 14. Kodak end-users who purchased ISO service prior to Kodak's tying arrangement are now forced to purchase Kodak service. Kodak's tying of parts to service has brought about the ISO's demise as a viable competitor in the service market of Kodak equipment. Kodak in effect forces the end-user into purchasing parts they would prefer to purchase elsewhere. See *Digidyne Corp.* v. *Data General Corp.*, 734 F.2d 1336, 1340-41 (1984). The ISO's presence in the service market brought about intrabrand competition which prevented Kodak from possessing the power to force a purchaser to do something he would not do in a competitive market. Specifically, the ISO's intrabrand competition prevented Kodak from forcing a customer to purchase Kodak service. It is the complete lack of competition in the intrabrand market for service of Kodak equipment which grants Kodak the special ability to create an illegal tying arrangement.

THE DECISION BELOW SUPPORTS COMPETITION AND ESTABLISHES A FACTUAL INQUIRY ON THE MERITS OF THE CASE

The intense interbrand and intrabrand competition in the business equipment and systems industry promotes technical advancements and consumer benefits such as lower prices, education and exceptional product service. The Court of Appeals, recognizing the importance of intrabrand competition, reversed the District Court's summary judgment decision and remanded this case for trial on the merits. Kodak, in its brief argues summary judgment is proper if plaintiff's claim is contrary to "economic sense." PB at 29 citing *Matsushita Electric Industrial Co.* v. *Zenith Radio*, 475 U. S. 574 (1986). At issue in this case is whether Kodak's theory of market power or the ISO's theory of market power makes "economic sense." Each party argues their interpretation of market power is correct, creating a triable issue of fact which should not be dismissed.

The Ninth Circuit correctly found price competition in aftermarket service to be sufficient evidence of market power to withstand summary judgment. Kodak and amici suggest that Respondents produce market analysis to survive summary judgment.

PB at 21. This suggestion is overly burdensome and in direct conflict with this Court's opinion in *United States* v. *Loews*, which provided, "it should seldom be necessary in a tie-in sale case to embark upon a full scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of seller's percentage share in that market." *United States* v. *Loews*, 371 U.S. 38 (1962), cited by *Digidyne Corp* v. *Data General Corp.*, 734 F.2d 1336, 1340 (1984). Respondent's evidence of market and monopoly power in the tying product (parts) is sufficient to restrain competition in the relevant (tied) service market. To determine otherwise could have staggering effects on the viability of future antitrust claims.

It is not implausible to imagine that any manufacturer faced with eroding profit margins on equipment sales would turn to service as a source to increase its revenues. To do so the manufacturer may terminate their authorized dealer channel and begin to exclusively provide service for its own brand of products. A decision determining Respondent's failure to present a triable issue of fact would preclude dealers or other authorized distribution channels from bringing suit should their manufacturer follow Kodak's example and foreclose intrabrand competition. Manufacturers could be empowered to eliminate all intrabrand competition based on the premise each lacks market power in the relative interbrand market of equipment sales.

The evidence Respondents provide, namely that Kodak has sufficient power in the parts market to force customers to purchase its service illustrates that there is more than "some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co.* v. *Zenith Radio*, 475 U.S. 574, 586 (1986). The standard Kodak asks this Court to impose would establish an onerous burden on Respondent to survive summary judgment through in depth market analysis illustrating that the effects of market imperfections in contradiction with other decisions.

KODAK'S BUSINESS JUSTIFICATIONS DO NOT PRECLUDE SECTION 2 LIABILITY

Section 2 of the Sherman Act prohibits monopolies through unlawful means. Business activities which are considered anticompetitive or exclusionary are prohibited conduct for a monopolist. Respondents argue that Kodak's anticompetitive actions of tying parts to service constitutes a violation of Section 2. In *Aspen Skiing*

Co. v. *Aspen Highland Skiing Co.*, 472 U.S. 585 (1985), a competitor with anti-competitive motives instituted a policy change which resulted in a change of character of the market. This Court in *Aspen* was not persuaded by the Petitioner's "normal business justification" argument to condone its actions. On the contrary, this Court found "the evidence supports an inference that [defendant] was not motivated by efficiency concerns." *Id.* at 610. Kodak argues its business justifications, namely, "promoting high quality service, reducing inventory costs and eliminating free riding were brushed aside" by the Ninth Circuit. PB at 38. The Ninth Circuit found Kodak's first two business justifications to be "pretextual" and "not genuine" and therefore remanded the case to the District Court.

The Ninth Circuit correctly discredited Kodak's business justifications due to the ISO's specific skills and the timeliness of the tying arrangement. Kodak's claimed interest in providing well trained technical staff to provide support of equipment is a legitimate concern to all manufacturers. Kodak, however, is narrow minded in its view that only the equipment manufacturer is able to provide the high caliber service necessary to properly support Kodak products. Kodak's competitors in the interbrand market of equipment sales provide service support for their brand of equipment through an authorized dealer channel. The manufacturer trains the dealer in the proper care and maintenance of equipment and then allows the dealer to compete for service in order to insure high quality support of equipment. In absence of the authorized dealer channel, when able to purchase Kodak parts, ISO's were able to provide high quality service of Kodak equipment. The ISO's, many of them former Kodak employees, bring years of experience and factory training by Kodak to their customers.

ISO's, like Kodak, have a strong interest in providing high quality service to Kodak customers. Like an authorized dealer, if an ISO fails to properly maintain equipment, they run the risk of losing future service revenues. ISO's, as their name implies, are strictly service organizations dedicated to the service of equipment. As strictly a service provider, ISO's must rely on their superior service to insure customer satisfaction and future revenues. ISO's must overcome the burden that they are not authorized service providers and are therefore, forced to provide outstanding service in order to compete effectively against Kodak. NOMDA does not object to reasonable requirements or standards established for ISO's by Kodak. NOMDA'S objection is to the total elimination of ISO's from the marketplace.

Kodak alleges the elimination of ISO's reduces parts inventory which justifies the tying arrangement. This argument is without merit, as Kodak's parts inventory is directly related to the number of Kodak machines placed with end-users. The elimination of the ISO's will not decrease Kodak's parts inventory. Instead, customers who are forced to use Kodak service will no longer obtain parts from ISO's but instead purchase parts from Kodak. Rather than selling parts to ISO's, Kodak will inventory all parts for all end-users and increase inventory due to the lack of parts purchases from ISO's. The quantity of parts required to be maintained by Kodak depends directly on product reliability not the existence of ISO's.

Petitioners' brief contends Kodak's refusal to sell parts to ISO's eliminates free riding. Free riding is an undesirable market henomenon which allows a dealer to benefit from another party's services, thereby omitting capital expenditures to develop their own services. It is difficult to apply the term "free riding" to the ISO's practice of purchasing Kodak parts. In its Amicus Curiae Brief on behalf of Respondent in *Business Electronics Corporation* v. *Sharp Electronics Corp.*, NOMDA condemned the Petitioner free rider who offered no services themselves. "Instead free riders divert buyers who have taken advantage of another dealer's services, offering prices that are lower because they do not reflect the true cost of making a sale." Amicus Brief for Respondent at 6, *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988) No. 85-1910. There are few similarities between the free rider criticized in Sharp and the ISO's service of Kodak equipment. The free rider in Sharp took advantage of the pre-sale, point-of-sale and post-sale services offered by a full service dealer in equipment sales. Without providing any support, the free rider in *Sharp* cut prices in equipment sales after diverting customers who had taken advantage of another dealer's services. Respondent ISO's do not partake of any actions similar to the free rider in *Sharp*. ISO's as Kodak parts customers, paid premium prices to obtain Kodak parts. In reality Kodak is merely relabeling its inventory argument which has previously been invalidated. The analogy of ISO's free riding as Kodak's subsidizing ISO's parts purchases is without basis. There is nothing "free" about ISO's purchases of parts from Kodak.

NOMDA and NASD conclude that the lack of intrabrand competition in the parts and service aftermarkets equips Kodak with market power to eliminate competition and the benefits competition brings. Dealers would welcome a decision in this case recognizing that parts and service are separate markets than that of equipment sales. By doing so, this Court would insure the existence

of dealers as future service providers should manufacturers choose to eliminate the dealer channel in equipment sales. Because manufacturers such as Kodak are not obligated to distribute products through dealers in the interbrand market, this Court's decision recognizing separate markets and the subsequent market power which exists from a single source of distribution, will protect the dealer channel as service providers for aftermarket support of equipment.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief Amicus Curiae of The California State Electronics Association (CSEA); The Appliance Servicers Division of CSEA (ASD); The Independent Warranty Servicers Division of CSEA (IWS); The Arizona State Electronics Association (ASEA); The Television Service Association of Arkansas; NESDA of Colorado; The Electronics Service Association of Connecticut (TELSA); The Florida Electronics Service Association; The Georgia Electronic Service Dealers Association; The Idaho Professional Electronics Association (IPEA); The Electronic Service Dealers Association of Illinois; The Indiana Electronic Service Association; The Indiana Satellite Dealers Association; The Television Service Association of Iowa; The Kansas Electronics Association; The Kentucky Electronic

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Association; The Television and Electronics Services Association of Long Island; The Electronic Technicians Guild of Massachusetts; The Metropolitan Electronics/Television Service Dealers Association; The Electronic Service Dealers Association of Michigan; The Missouri Electronics Service Dealers Association; The Nebraska Electronics Service Association; The Electronics Technicians Association/Greater New Orleans; NESDA/New York State; The Nevada State Electronics Association; The Television and Radio Association of New England (TRANE); The Western New York Electronics Guild; The North Carolina Electronic Service Dealers Association; NESDA of Ohio; The Oregon Professional Electronics Association; TESA/St. Louis; The Tennessee Electronics Sales/Service Dealers Association; The Texas Electronics Association; The Vermont Electronic Technicians Association; The Virginia Electronics Association; NESDA of Washington; The Wisconsin Electronics Sales/Service Association;

The Florida Service Agreement Association; American Way Service Corporation, S.E. Vehicle Protection Plan; Amira Services, Inc.; Atlas Service, Inc.; Broward Factory Service; Climate Control Services, Inc.; Encore Service Systems, Inc.; E.R.A. Electronic Realty Associates; Guaranteed Homes, Inc.; Homeowners Association of America, Inc.; Phoenix American Insurance Group; Total Appliance & Air Conditioning, Inc.; United Service Protection, Inc.; United States Warranty Corporation; Universal Warranty Corporation; Video Aid Corporation;

Andrews Electronics; Audio Video Parts Incorporated; Fox International Incorporated; Pan-Son Electronics; Forms N, Printing Incorporated; Sencore; and The Computer Dealers and Lessors Association, Inc. (CDLA)

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No. 90-1029

In the Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., et al.,

Respondents.

Brief Amicus Curiae of

The California State Electronics Association (CSEA); The Appliance Servicers Division of CSEA (ASD); The Independent Warranty Servicers Division of CSEA (IWS); The Arizona State Electronics Association (ASEA); The Television Service Association of Arkansas; NESDA of Colorado; The Electronics Service Association of Connecticut (TELSA); The Florida Electronics Service Association; The Georgia Electronic Service Dealers Association; The Idaho Professional Electronics Association (IPEA); The Electronic Service Dealers Association of Illinois; The Indiana Electronic Service Association; The Indiana Satellite Dealers Association; The Television Service Association of Iowa; The Kansas Electronics Association; The Kentucky Electronic Association; The Television and Electronics Services Association of Long Island; The Elec-

tronic Technicians Guild of Massachusetts; The Metropolitan Electronics/Television Service Dealers Association; The Electronic Service Dealers Association of Michigan; The Missouri Electronics Service Dealers Association; The Nebraska Electronics Service Association; The Electronics Technicians Association/Greater New Orleans; NESDA/New York State; The Nevada State Electronics Association; The Television and Radio Association of New England (TRANE); The Western New York Electronics Guild; The North Carolina Electronic Service Dealers Association; NESDA of Ohio; The Oregon Professional Electronics Association; TESA/St. Louis; The Tennessee Electronics Sales/Service Dealers Association; The Texas Electronics Association; The Vermont Electronic Technicians Association; The Virginia Electronics Association; NESDA of Washington; The Wisconsin Electronics Sales/Service Association;

The Florida Service Agreement Association; American Way Service Corporation, S.E. Vehicle Protection Plan; Amira Services, Inc.; Atlas Service, Inc.; Broward Factory Service; Climate Control Services, Inc.; Encore Service Systems, Inc.; E.R.A. Electronic Realty Associates; Guaranteed Homes, Inc.; Homeowners Association of America, Inc.; Phoenix American Insurance Group; Total Appliance & Air Conditioning, Inc.; United Service Protection, Inc.; United States Warranty Corporation; Universal Warranty Corporation; Video Aid Corporation;

Andrews Electronics; Audio Video Parts Incorporated; Fox International Incorporated; Pan-Son Electronics; Forms N, Printing Incorporated; Sencore; and The Computer Dealers and Lessors Association, Inc. (CDLA)

In Support of Respondents

INTEREST OF AMICUS CURIAE

The Amici represent substantial sectors of the United States economy related to the servicing and maintenance, ownership, leasing, remarketing, and end use of equipment and products sold to businesses and consumers in the United States.[1]

The Amici are:

1) Thirty-seven national and state associations comprised of member companies and individuals engaged in the servicing of electronic products to both businesses and consumers ("Electronics Associations");

2) A state association and fifteen of its member companies which provide warranty coverage to consumers ("Warranty Association");

3) Individual companies which distribute parts and products to the electronics service industry ("Distributors" and "Suppliers");

4) A manufacturer and designer of diagnostic equipment for the entire electronics service industry; and

5) A national association of companies which own, lease, and remarket computers and other equipment to businesses and end users ("Owners and Lessors Association").

The independent interests of the Amici converge in this case in that all of the Amici are themselves consumers and end users of equipment and products. They are also either direct service and warranty service providers to consumers, owners, or end users of equipment and products that require maintenance or service, or

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[1]This Brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

providers of equipment and products to the service industry, or lessors and remarketers of computers and equipment to end users.

The Amici do not wish to have consumer choices and options removed by reducing competition in the service industry.

If consumer choice and competition in the service industry is reduced by placing the warranty and aftermarket servicing and maintenance of equipment and products under the control of the companies who are original equipment manufacturers ("OEM"s):

1) all of the Amici will suffer substantial losses in both income and jobs;

2) consumers and end users will pay more for and receive less efficient service and maintenance;

3) owners will lose substantial monies invested in the equipment and products; and

4) the major sector of the United States economy, i.e. service, will significantly contract.

A. The Electronics Associations

The Electronics Associations[2] consist of member companies and individuals who service consumer electronics products.[3]

The members of the Electronics Associations and others in the same business have approximately 40,000 separate establishments with approximately 3 employees per establishment, representing approximately 120,000 jobs.[4]

The members of the Electronics Associations are specially trained in the servicing of the various products and engage in constant retraining through classes, seminars, and private schools. In order to perform their service functions, the members of the Electronics Associations must make substantial financial investments in facilities, diagnostic equipment, technical literature, and replacement parts for numerous manufacturers and brand name products.

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[2]The Electronics Associations consist of: The California State Electronics Association (CSEA); The Appliance Servicers Division of CSEA (ASD); The Independent Warranty Servicers Division of CSEA (IWS); The Arizona State Electronics Association (ASEA); The Television Service Association of Arkansas; NESDA of Colorado; The Electronics Service Association of Connecticut (TELSA); The Florida Electronics Service Association; The Georgia Electronic Service Dealers Association; The Idaho Professional Electronics Association (IPEA); The Electronic Service Dealers Association of Illinois; The Indiana Electronic Service Association; The Indiana Satellite Dealers Association; The Television Service Association of Iowa; The Kansas Electronics Association; The Kentucky Electronic Association; The Television and Electronics Services Association of Long Island; The Electronic Technicians Guild of Massachusetts; The Metropolitan Electronics/Television Service Dealers Association; The Electronic Service Dealers Association of Michigan; The Missouri Electronics Service Dealers Association; The Nebraska Electronics Service Association; The Electronics Technicians Association/Greater New Orleans; NESDA/New York State; The Nevada State Electronics Association; The Television and Radio Association of New England (TRANE); The Western New York Electronics Guild; The North Carolina Electronic Service Dealers Association; NESDA of Ohio; The Oregon Professional Electronics Association; TESA/St. Louis; The Tennessee Electronics Sales/Service Dealers Association; The Texas Electronics Association; The Vermont Electronic Technicians Association; The Virginia Electronics Association; NESDA of Washington; and The Wisconsin Electronics Sales/Service Association.

[3]i.e. TVs, VCRs, camcorders, stereo equipment, facsimile machines, monitors, close-circuit/security TV equipment, automobile stereo equipment, satellite equipment, and, in some instances, computer and photocopier equipment.

[4]This estimate is made by the Electronics Associations and does not include in-house service employees of manufacturers who perform the same services on the same equipment, which is estimated at approximately 30,000 jobs.

B. The Warranty Association

The Florida Service Agreement Association is comprised of approximately 27 companies in the state of Florida[5] which provide service under warranty agreements to consumers and others for automobiles, homes, and appliances. Each of the member companies maintains a service facility and employs between 6 and 150 people.

All of the employees of the member companies are specially trained in their respective fields and undergo continuous updating in their training. Each of the companies has a substantial investment in its facility and equipment used to perform the services. The member companies purchase replacement parts from both OEMs of brand name products and those companies which manufacture generic parts for such brand name products, and maintain inventories of such parts.

C. The Distributors and Suppliers

Andrews Electronics, Audio Video Parts Incorporated, Fox International Incorporated, and Pan-Son Electronics are companies which purchase replacement parts and supplies from OEMs and distribute such to the service industry. The purchases are made from both domestic and foreign manufacturers of brand name products[6] and from the various manufacturers of generic

[5]Member companies of The Florida Service Agreement Association also participating individually in this brief are: American Way Service Corporation, S.E. Vehicle Protection Plan; Amira Services, Inc.; Atlas Service, Inc.; Broward Factory Service; Climate Control Services, Inc.; Encore Service Systems, Inc.; E.R.A. Electronic Realty Associates; Guaranteed Homes, Inc.; Homeowners Association of America, Inc.; Phoenix American Insurance Group; Total Appliance & Air Conditioning, Inc.; United Service Protection, Inc.; United States Warranty Corporation; Universal Warranty Corporation; and Video Aid Corporation.

[6]i.e. Zenith, Sony, Panasonic, and others.

parts[7] which are used in almost all electronic equipment irrespective of brand name.

It is estimated that approximately 5,000 people are employed by distributors in the distribution of original equipment replacement parts.[8]

Forms N, Printing Incorporated and other similar companies supply invoice and other forms to the service industry. Most of these companies are small, with 12 employees or less.

D. A Manufacturer and Designer of Diagnostic Equipment

Sencore is a manufacturer and designer of diagnostic and measuring/test equipment for the electronics service industry. It also provides constant upgrading seminars to such industry. It is estimated that approximately 10,000 people are employed in the manufacture and design of diagnostic and measuring/test equipment.

E. The Owners and Lessors Association

The Computer Dealers and Lessors Association, Inc. ("CDLA") is a nonprofit trade association of over 350 companies whose primary business is leasing and remarketing of computers and other information technology equipment. The dollar volume in the leasing and remarketing business was approximately $25 billion in 1990.

CDLA members are concerned with protecting and extending the useful life of equipment, and preserving the economic value of equipment by maintaining a strong leasing and secondary market. CDLA views independent

[7]i.e. capacitors, idler wheels, resistors, rubber tires, transistors, video heads (in some instances), and others.

[8]This estimate, made by the Distributors, does not include those people employed by the companies which import these parts.

service organizations as a vital part of this process. CDLA believes that independent service organizations provide customers competitive alternatives and fulfill market demands, particularly when a manufacturer is not meeting the demands of the market.[9]

SUMMARY OF ARGUMENT

The United States has become a service economy with service related activities now comprising over 60% of the Gross National Product (GNP) and growing. In 1988 the total value of service was almost $3 trillion, out of a total GNP of $4.8 trillion. Approximately 250,000 service organizations provide service to products.

"High tech" service was estimated to be over $250 billion in 1988, with $100 billion relating to the servicing of electronic, electrical or electrical mechanical equipment.

In the past 10 years service organizations which are not owned by manufacturers have emerged to provide services to consumers and end users. Some of these service organizations consist of divisions of major computer manufacturers who service computers of their competitors.

In the computer industry the providing of services and maintenance comprise approximately $24.7 billion.

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[9]This occurs when manufacturers:

1) choose not to or cannot meet the customer's demands for service;
2) charge excessive prices for service;
3) charge excessive fees for certifying equipment as eligible for their maintenance;
4) have unreasonable or unpredictable policies and practices for certification; or
5) use maintenance policies or pricing to force the purchase of new equipment.

In the automobile industry revenues for aftermarket products are approximately $155.5 billion at the retail level, and revenues for services are approximately $90 billion to $100 billion annually.

Consumer demand has divided the marketplace into original equipment, parts, and service. Without such demand such markets will cease. Restrictive policies, such as those in this case, will also cause competition to decline and consumer welfare to decrease.

Kodak's policies of tying parts to service consist of a factual tying arrangement which is not of the usual form of tying original equipment to parts or service. The application of interbrand competition to Kodak's policies is a new extension of the market definition in tying arrangement cases.

The theory of interbrand competition, as related to copier systems, does not reflect the marketplace or the consumer's choices.

The issue of market power, and particularly which market, is the crux of this case. Copier equipment is not sold as systems of equipment, parts, and service. Original equipment is not an appropriate market to measure market power since original equipment is not part of the tying arrangement. The theory of interbrand competition is inappropriate when a physically and economically unique product is the tying product.

An extension of the definitions of product markets or the relevant market is not appropriate and would result in the disappearance of the competitive service industry and all of its price and efficiency benefits to consumers.

ARGUMENT

I.

SERVICE HAS REPLACED MANUFACTURING AS THE MAINSTAY OF THE UNITED STATES ECONOMY

As the United States economy matured and its rate of growth lessened, manufactured equipment and products have begun to achieve saturation levels. In addition, new equipment and products are being manufactured with longer life cycles through the use of stronger materials and higher technologies.

These factors, amongst others, have caused the service sector of the economy to expand from its traditional definition to include service and maintenance of equipment and products.[10]

A. Service Related Activities Now Comprise Over 60% of the Gross National Product and Are Growing

During 1988, the total value of service in the United States economy was almost $3 trillion, out of a total GNP of $4.8 trillion. This represents over 60% of the total economy and is growing. The equipment service market alone will continue to grow at a rate of more than 17% into the 1990s.[11]

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[10]As may be expected with such expansion, research is being done and continuing studies are now available about the service sector and its components as a distinct sector of the economy. These studies clearly demonstrate that the mainstay of the United States economy is now service.

Some of the published materials will be referred to herein under the "Brandeis Brief" concept. *Muller v. Oregon* 208 U.S. 412, 421 (1908), in which the Court stated, ". . . We take judicial cognizance of all matters of general knowledge."

[11]See D.F. Blumberg, *Managing Service as a Strategic Profit Center*, McGraw-Hill, Inc., 1991 ("*Managing Service*"), pp. 37-38. This estimate was based upon statistics from the United States Department of Commerce. At pp. 33-35, the service market is described as follows:

> ". . .Our economy now produces much more 'services' than 'goods,' and this ratio is continuously increasing.
>
> In addition to the traditional services such as banking and finance, health care, retail trade, and transportation and distribution, there are services provided by goods producers. The maintenance and support of plant and equipment used in producing the goods and field and customer services extended by product manufacturers, distributors, and independent service providers to end users are additional services which must also be considered.
>
> These embedded services, added to the 'stand-alone' service businesses and activities, have turned the United States (and most other developed nations) into a predominantly service-oriented economy.
>
> * * *
>
> Of all the service businesses in the United States, the field service organizations have experienced *substantial growth*. These organizations are concerned with the design, installation, maintenance, and repair of field- and plant-based products, equipment, and systems, particularly high technology. Service and support are provided for many types and classes of products, including data processing and office automation equipment, office products (copying equipment, typewriters, etc.), telecommunications equipment, medical electronics equipment, process control and plant automation equipment, and heating, ventilation, and air-conditioning equipment. This particular segment of the total service market is growing at a more rapid rate than the traditional services sector."

[12]*Id.*, p. 35, 37-39.

Approximately 250,000 service organizations provide service to products. Approximately 80,000 have 5 or more service personnel. In 1988 the manufacturing-oriented field service segment of the economy represented a $128 billion market; equipment services and communications, utilities, and government increased this estimate to $547 billion.[12]

B. The "High Tech" Service Market Has Seen and Will See Significant Expansion

The "high tech" service element of the economy has been estimated to be in the range of over $250 billion based on the 1988 Standard Industrial Classification (SIC) data. Approximately $100 billion relates to the servicing of electronic, electrical, or electrical mechanical equipment.[13]

The service market of information systems and equipment, stand-alone communications equipment, integrated networks, building/factory automation, and application of specific "high tech" equipment, accounted for $34 billion in expenditures in 1988. Adding "high tech" services, including design and engineering professional services, software services, facilities management, support, and other logistics services, including depot repair, the total "high tech" market was approximately $57 billion in 1990 and is projected to grow to over $93 billion by 1993.[14]

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[13]See D.F. Blumberg, "*A New Strategic Assessment of the High Tech Equipment Field Service Market and Support Structure in the United States*," 1991, pp. 2 and 7, respectively, for these estimates.

The life cycle costs for equipment are also discussed at p. 2. Generally, over the life cycle of an installed piece of equipment or system, 35% of the initial acquisition price is related to design, integration, installation, and initial warranty service. Expenditures for services that support the equipment or system typically run about 15% of the initial acquisition price on an annual basis. The total cost for equipment or system ownership over a seven year economic life cycle, from initial acquisition through full maintenance and repair services, will be about 2.2 to 2.5 times greater than the initial hardware acquisition cost.

[14]D.F. Blumberg, "*Strategic Directions & New Trends in Third Party Maintenance Market for the 1990's*," 1991 ("*Strategic Directions*"), p. 6.

A particular growth area in the "high tech" markets is the provision of service as a separate line of business for design, engineering, installation, and maintenance and repair. In the past these types of services were provided to the owner or end user by the OEM or by a manufacturer's distributor. In the past 10 years, a class of service organizations has emerged, referred to as third party maintainers ("TPM"s), who provide these services to the end users either with the authorization and support of the OEM or directly.[15]

These TPMs (also known as independent service organizations or "ISOs" or "multivendor service organizations") consist of both independent companies and, in the computer industry, divisions of major computer companies, such as IBM, NCR, DEC, and AT&T.[16]

The total TPM market has grown due to increased customer emphasis on service response and quality, the proliferation of technology and products used by firms without in-house service capabilities, particularly in the area of personal computers, local area networks, workstations, communications controls, and peripheral equipment, a growing interest in service "cost containment," improving service responsiveness and quality, and reducing service problems, including the costs of "downtime" and "fingerpointing." This part of the service market accounted for approximately $11 billion in 1990 and is currently growing at a compounded annual rate of over 15%.[17]

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[15]*Managing Service*, pp. 40-41.

[16]Frost & Sullivan, "*The U.S. Market for Multivendor & Third Party Computer Maintenance*," Report No. A2329/D, Summer 1991 ("*Multivendor and TPM Maintenance Report*"), p. 8.

[17]*Strategic Directions*, pp. 4-7.

C. In the Computer Industry, the Providing of Services and Maintenance Comprise 25% of Revenues of the Top 100 North American Computer Companies

The revenues for these companies is $184.7 billion. Services contribute 11.6% or $21.4 billion to that total and maintenance contributes 13.4% or $24.7 billion.[18]

Third party maintenance revenues had grown from $540 million in 1983 to $1.7 billion in 1987, with a 10% annual growth rate projected over the next five years. The revenues from third party and multivendor maintenance of computers in the United States, which totaled about $2 billion in 1990, are projected to grow to approximately $2.7 billion by 1995 in constant 1990 dollars.[19]

D. In the Automobile Industry the Revenues in the Aftermarket for Merchandised Products and Services Are Greater Than the Estimated Annual Sales of New Automobiles in the United States

The revenues at the manufacturers level for automotive and light truck aftermarket merchandised products was estimated to be $100.6 billion in 1990, with an annual growth rate of 2.3%, to be $112.8 billion in 1995. On the retail side, the market was estimated to be $155.5. billion and $174.1 billion, respectively. The service

[18] *Service News*, Vol. 11, No. 10, September 1991, p. 6, reporting on Datamation Magazine's latest survey, the Datamation 100.

[19] *Multivendor and TPM Maintenance Report*, pp. 1-3. At pp. 7-8 the Report further states that prior to the late 1980s most computer manufacturers had adopted a policy of servicing only their own equipment, and thus lost revenues to TPMs. In the late 1980s these computer manufacturers began to offer maintenance services on systems that did not have any of their own components.

revenues were estimated to be between $90 billion and $100 billion annually.[20]

The retail sale of new automobiles in the United States, for the year 1990, was estimated to be approximately $147.838 billion.[21]

In essence, the retail sale of aftermarket parts for automobiles and light trucks was greater than the sales of new automobiles for the year 1990; the amount expended on service was approximately two-thirds of the sales of new automobiles for the year 1990; and the combined revenues from aftermarket retail sales of parts and service was approximately $250 billion or about 140% of the sales of new automobiles for the year 1990.

II.

CONSUMER DEMAND AND THE REALITY OF THE MARKETPLACE HAVE SEPARATED ORIGINAL EQUIPMENT, PARTS, AND SERVICE AND MAINTENANCE INTO THREE DISTINCT MARKETS

Consumer demand has caused the marketplace in manufactured products such as electronics equipment, automobiles, computers, and office equipment to be

[20] See Frost & Sullivan, "The U.S. Automotive Aftermarket for Merchandised Products & Services," Report No. A2427/T, Spring 1991, p. 1.

[21] Estimate was made by J.D. Power & Associates, a marketing information company which follows and is used by the automobile industry. The estimate was made by reference to *Automotive News, 1991 Market Data Book*, May 29, 1991, pp. 19-27, which contains statistics as to the number of automobiles sold in the United States for the year 1990, and pp. 63-65, which contains statistics as to the prices of automobiles sold in the United States for the year 1990. The average price of the automobile was determined to be $14,500, and this price was multiplied times the number of automobiles sold to obtain the estimate.

divided into separate and distinct markets, as demonstrated by the various participants in each of these markets.

If consumers do not desire to purchase parts from manufacturers other than OEMs or obtain service and maintenance from TPMs, then only the OEMs will remain in these markets.

Practices such as those of Kodak, if adopted by other manufacturers, will artificially cause the markets to contract and stifle the consumer's desires and welfare by removing the consumer's options to obtain parts and service from anyone other than manufacturers.

Such practices are not consistent with the policy that the antitrust laws should benefit the welfare of the consumer, since such conduct artificially displaces the natural functioning of the marketplace.

III.

KODAK'S POLICIES AND CONDUCT ARE A TYING ARRANGEMENT

Kodak makes and sells high volume copiers and micrographics equipment. Kodak also makes or procures replacement parts for use in service and sells service for such equipment (Pet.Br. pp. 2-3).

ISOs service Kodak copiers and micrographics equipment but do not manufacture parts for use in service. ISOs compete against Kodak (Pet.Br. p. 5).

It is undisputed that many of the aftermarket parts for Kodak copiers are unique and only available from Kodak (Pet.App. 7A, 11A).[22]

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[22] 90% of Kodak parts are made outside of Kodak (J.A. 740).

Kodak took steps to prevent ISOs from purchasing parts from sources other than Kodak. ISOs could not buy such parts from the manufacturers due to existing restrictive agreements between the manufacturers and Kodak (J.A. 429). Kodak interfered with an ISO's purchase of parts from an independent broker by confiscating the parts in transit and thus preventing delivery (J.A. 517-518).

Kodak restricted the availability of used machines which could be used for parts (J.A. 510, 511; 505-506, 520, L. 71-74; L. 184-185; J.A. 428).

Kodak sold parts to customers only on the condition that they not be resold to ISOs (L. 178, L. 163, J.A. 428-429; L. 143).

Kodak told ISOs that if they wanted Kodak parts they had to stop servicing Kodak equipment other than their own (L. 143; L. 159).

Kodak also told service customers that ISOs could not get parts (J.A. 466).

Kodak admits to a policy of refusing to sell parts to ISOs (Pet.Br. p. 5) and requiring owners of Kodak equipment not to buy ISO service in order to receive parts from Kodak (Pet.App. 5A). Kodak will sell parts to owners who agree to self-service their machines (Pet.App. 5A).

Kodak has not tied the purchase of original equipment to either the purchase of parts or the purchase of service or both. Kodak has tied the purchase of parts used to repair or service the original equipment to the exclusion of ISOs performing such service.

In essence, Kodak's policy is not the usual tying arrangement in which original equipment which competes in an interbrand market is tied to the purchase of parts or service. Instead, Kodak's policy is one of tying together the two necessary components (i.e. parts which are unique, and service) to maintain such original equipment without tying the original equipment. Without parts or service, Kodak's original equipment would fail and be worthless.

Thus, essentially, Kodak has tied its original equipment to the "combined" purchase of unique parts and service from Kodak.

The effect of Kodak's conduct on the customer has been that (1) Kodak charged up to twice as much as ISOs for service that is lower quality; and (2) some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitor's systems (Pet.App. 10A-11A).

Kodak's practice is factually a tying arrangement under the definition set forth in *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958) ("*Northern Pacific*").[23]

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[23]The Court in Northern Pacific described tying arrangements and their effects at pp. 5-7 as follows, in relevant part:

> "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.
>
> • • •
>
> Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are . . . tying arrangements. [citation omitted]
>
> For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. [footnote omitted] Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' [citation omitted] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products . . . They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. [citations omitted] Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most."

Kodak argues that such factual tying arrangement is not unlawful since parts and service are derivative to the sale of Kodak copiers and therefore are not distinct "products" which can be tied together (Pet.Br. pp. 14-15).[24] Kodak primarily contends that an equipment manufacturer that lacks interbrand market power cannot have power, in an antitrust sense, in a wholly derivative aftermarket (Pet.Br. p. 16).

In essence, Kodak is requesting the Court to consider the tying arrangement as if the original equipment had been tied to the parts or service and thereby use original equipment as the tying product. This type of consideration would be a new extension of the market definition in tying arrangement cases. This extension could emasculate the entire concept of tying arrangements, and allow manufacturers to eliminate competition in the aftermarkets of parts and service.

IV.

THE THEORY OF INTERBRAND COMPETITION DOES NOT REFLECT THE REALISTIC MARKETPLACE

Although the theory of interbrand competition controlling parts and service may have initial appeal, such theory does not conform to the today's realistic marketplace.

---

[24]Kodak also claims that its conduct was a unilateral refusal to deal, not a tying arrangement, and that Kodak service is not a relevant market which can be restrained or monopolized (Pet.Br. pp. 15-16).

The claim that only interbrand competition exists because consumers buy "systems" and consider the total cost of original equipment, parts, and service over the life cycle of the equipment (Pet.Br. pp 3-4) is also not reflective of the realistic marketplace.

Very few consumers have all of the data to make this judgment available to them at the time of the purchase of the original equipment. Further, the manufacturers do not sell a complete system of original equipment, lifetime parts and lifetime service and maintenance for a single price.

Kodak and manufacturers sell equipment for one price, parts for individual parts prices which are not guaranteed as to price rises, and service and maintenance under separate agreements, or hourly.

Given the structure of the marketplace, the consumer has the option of obtaining the lowest price in each of these three markets from different vendors in each market. The consumer is not bound to purchase the equipment, parts, or service from only the manufacturer.

Even if the consumer is knowledgeable as to the costs in all three markets and considers such before his original equipment purchase, the consumer has the option of determining which vendor in which of the three markets he will use. This option is removed if the consumer is either subject to a manufacturer's tying arrangement of two or all three of the markets, or if the equipment can only function with the manufacturer's parts, i.e. unique parts.

However, even in this situation, the consumer has the option and may negotiate a low price for the equipment from the manufacturer and a low price for service and maintenance from a TPM, thus reducing the overall lifetime costs, even if the manufacturer "gouges" on the parts prices.

Interbrand competition does not have any effect in a marketplace where different entities sell into the different markets, i.e. Kodak versus Canon or Kodak versus Xerox in the original equipment market, the manufacturer versus independent parts suppliers who also compete with each other in the parts market, and the manufacturer versus TPMs who also compete with each other in the service market.

Kodak's theory of interbrand competition could only exist if the original manufacturer was the only person to sell the equipment parts and provide the service.

V.

KODAK'S TYING ARRANGEMENT IS UNLAWFUL ABSENT A NEW DEFINITION OF PRODUCT MARKETS AND RELEVANT MARKET

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) ("*Jefferson Parish*"), has set forth that a tying arrangement is unlawful where (1) the seller has "market power" in the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms (466 U.S. 12-18 and cases cited therein); (2) the tie forecloses a "not insubstantial" amount of potential sales for the "tied" product (466 U.S. 16); and (3) the tie links "two separate products" (466 U.S. 18).

The issue of "market power" and particularly which "market," is the crux of this case. The determination of whether market power exists is a function of which market is used: (1) interbrand equipment systems, consisting of original equipment, parts, and service and maintenance; (2) interbrand original equipment; (3)

parts; or (4) service.[25]

This issue is of crucial importance to the Amici since this Court's decision may establish the future structure of the service industry, which represents over 60% of the GNP.

A. Interbrand Competition Does Not Exist in an Integrated Equipment, Parts, and Service Market

In addition to equipment sales, Kodak considers service revenues an important part of its total return on its investments (Pet.Br. p. 8).

---

[25] *Jefferson Parish* provided criteria for the assessment of separate product markets, as follows, at pp. 19-23:

> "Our cases indicate, however, that the answer to the question whether one or two products are involved turns not on the functional relation between them, *but rather on the character of the demand for the two items.* [footnote omitted] In *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953), the Court held that a tying arrangement was not present because the arrangement did not link two distinct markets for products that were distinguishable in the eyes of buyers. [footnote omitted] In *Fortner I*, the Court concluded that a sale involving two independent transactions, separately priced and purchased from the buyer's perspective, was a tying arrangement. [footnote omitted] These cases make it clear that a tying arrangement cannot exist unless two separate product markets have been linked.
>
> The requirement that two distinguishable product markets be involved follows from the underlying rationale of the rule against tying. The definitional question depends on whether the arrangement may have the type of competitive consequences addressed by the rule. [footnote omitted] The answer to the question whether petitioners have utilized a tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying - that petitioners have foreclosed competition on the merits in a product market distinct from the market for the tying item. [footnote omitted] . . ." [emphasis added]

The underlying thrust of Kodak's argument is that copier equipment is only sold in conjunction with parts and service being provided by Kodak and other OEMs (Pet.Br. pp. 2-3), and that competitive conditions in the equipment markets prevent Kodak from charging supercompetitive prices in any aftermarkets for Kodak parts or service (Pet.Br. p. 4).

Kodak contends that it only has 23% of the high volume copier market and 20% of the micrographics equipment market (Pet.Br. p. 3).[26]

The concurring opinion also agreed in this analysis at p. 39, wherein O'Connor, J., concurring, stated as follows:

> ". . . For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product.*" [footnote omitted] When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together." [emphasis in original]

[26] In a recent copier industry publication new statistics were given for the 1990 placement of high volume copiers, which showed the market share of Kodak in this industry for the year 1990. In summary, *Dataquest Copier Faxts*, April 1991, pp. 1 and 16, stated as follows:

> In 1990 approximately 1,212,200 plain paper copiers were placed in the United States. The copier market has been divided into 7 segments, i.e. PC (up to 12 copies per minute (cpm)), 1 (up to 20 cpm), 2 (21-30 cpm), 3 (31-44 cpm), 4 (45-69 cpm), 5 (70-90 cpm), and 6 (91+ cpm). The definitions of the segments are found in *Dataquest Spec Check Competitive Copier Guide*, Spring 1991, at p. 9.
>
> Kodak only places copiers in segments 4, 5, and 6. The average retail prices for copiers in these segments are $13,766, $17,745 to $75,000, and $78,300 to $220,000, respectively. In segment 4 Kodak placed 3,900 of the 88,900 copiers, in segment 5 Kodak placed 8,000 of the 18,900 copiers, and in segment 6 Kodak placed 1,200 of the 13,900 copiers.
>
> In segment 5 the closest competitor to Kodak was Canon, which placed 5,000 copiers, and the next competitors were Konica and

As shown in the April 1991 *Dataquest Copier Faxts*, Kodak and Canon, its main competitor in Segment 5 of the copier market, account for approximately 65% of such market, and Kodak and Xerox, its main competitor in Segment 6, account for approximately 96% of such market. Kodak itself identified these companies as its main competitors (Pet.Br. p. 8).

These market shares of the high volume segments of the copier market do not indicate "fierce competition" for the recent year 1990 but rather market power, monopoly and duopoly.

Kodak does not sell equipment, parts and service as one package, i.e. "Kodak system," for one price.[27]

Mita, who each placed 1,500 copiers. Kodak accounted for approximately 44% of the copiers placed in this segment. Kodak and Canon together accounted for approximately 65% of such segment. This segment consists of highly featured copiers with an average monthly volume of 69,000 copies.

In segment 6 the largest market share was that of Xerox having placed 12,500 of the 13,900 copiers. Kodak placed 1,200 and the only remaining competitor, OCE, placed 200. Kodak and Xerox accounted for approximately 96% of such segment. This segment consists of copiers primarily used in central reproduction departments with an average monthly volume of 180,000 copies.

Segments 5 and 6 of the market are considered the high end of the market.

[27]Petitioner's Brief at p. 3 states:

"Like all sophisticated business equipment, Kodak's copiers and micrographs products require regular service and occasional repairs to function properly. J.A. 160, 179. So, as an integral part of its equipment sales business, Kodak sells service and makes or procures replacement parts used in service. Kodak provides service contractually, three different ways: (1) initial warranty service, included in the purchase price of the equipment; (2) annual service contracts, which include regular maintenance, repairs, and all necessary parts; and (3) time and material service on a "per call" basis. Kodak does not compel its equipment owners to purchase Kodak service. Indeed, Kodak customers who service their own equipment can purchase parts separately. J.A. 171-72, 190."

Although purchasers may consider service and parts costs to be an important component of total equipment costs (Pet.Br. pp. 3-4), such costs may not be readily known.

A consumer negotiating with Kodak for the "Kodak system" must negotiate numerous prices:

1) the equipment purchase price;

2) the annual service contract price each year if desired;

3) the time and material service prices "per call;" and

4) the parts prices.

All of these prices, other than the equipment purchase price, may change over the life cycle of the equipment.

The "total cost" of the "Kodak system" may also change if the purchaser purchases its parts from a source other than Kodak, and/or its service from an ISO.

Thus, even if the "total cost" of the "Kodak system" was known, the existence of the ISOs in the service marketplace requires Kodak to price its equipment at a competitive level, irrespective of the prices of parts and service.

Kodak may have adopted a different sales strategy (Pet.Br. pp. 6-7), however just the adoption of a strategy does not make such a market reality; nor does such strategy lead to the unquestioned assumption that competition is only for the "entire system" at an interbrand level.

It is more probable that the purchaser, if he does view the purchase as a "system," would compare the price of the original equipment at the interbrand level, i.e. Kodak, Xerox, or Canon; the price of service from all competitors, i.e. Kodak, Xerox, Canon, and ISOs; and the price of parts from all competitors. This probability is based upon the purchaser's experience in

the automobile and computer industries.[28] There does not appear to be any reason that the copier industry should be different.

It does not follow that a consumer, if having difficulty with Kodak's price for service, would go to Xerox or Canon to purchase all new equipment. In reality the consumer would go to an ISO, as in this case.

Only if ISOs do not exist and Xerox and Canon do not provide service on Kodak equipment, would the consumer consider scrapping the Kodak equipment and purchasing a competitor's equipment. However, even in this instance, the price of the competitor's equipment, parts, and service would have to be less than the cost to remain with Kodak for the remaining life of the machine (Pet.App. 11A).

B. Original Equipment Alone May Not Be the Relevant Market in Which to Measure Market Power

Neither Kodak copiers nor micrographics equipment are the tying product or the tied product. Thus unless the concept in tying arrangements of measuring market power is extended to measuring market power in a market that is not part of the tying arrangement, original equipment may not be the appropriate market to measure in this case.

Further, despite market shares having been given for the original equipment market only, Kodak itself does not limit its market claim to only original equipment.

---

[28]Pet.App. 7A, referring to "*Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480 n. 3 (9th Cir. 1986) (applying California law) (Noting that for some products, such as automobiles, the parts market is distinct from the service market), *modified* 810 F.2d 1517 (9th Cir. 1987); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1339 (9th Cir. 1984), *cert. denied*, 473 U.S. 908, 105 S.Ct. 3534, 87 L.Ed.2d 657 (1985) (holding that separate markets existed for computer central processing unit and computer operating system)."

Kodak views the original equipment purchase market as one that encompasses service costs and parts costs as part of "total equipment costs" (Pet.Br. pp. 2-3). Figures were not given for this "total market."

None of the tying cases have adopted a theory of measuring the market power in the original equipment market when such equipment has not been part of the tying arrangement. To do so would appear to be an unwarranted extension of the market power analysis in tying cases, which was limited to only the products directly within the tying arrangement.

Alternatively, the claim that a manufacturer such as Kodak "cannot exercise market power in aftermarkets if it lacks market power in equipment markets comports with this Court's recognition in other contexts of the importance of interbrand competition,"[29] referring to vertical restraint cases, is not valid in a tying arrangement.

In "analogous" vertical integration cases, price is not a factor.[30]

---

[29]Brief for the United States as Amicus Curiae Supporting Petitioner, p. 15.

[30]In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) ("*Sharp*"), the issue was one of whether a nonprice vertical restraint was per se illegal in the context of a manufacturer having terminated a discounting dealer at the behest of another dealer. In this context, the power to raise or lower prices in the interbrand market by the manufacturer was not a factor.

Further, the reliance in *Sharp* upon *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("*GTE*"), was related to the promoting of competent and aggressive retailers to make the kind of investment that is often required in the distribution of products unknown to the consumer. In particular, footnote 19 of *GTE*, referred to in *Sharp*, specifically emphasized the importance of the independence of intrabrand competition from interbrand competition confronting the manufacturer.

Footnote 19 states as follows:

The concepts of vertical integration cases such as *GTE* and *Sharp* only converge with the concepts in tying arrangements at that point in the early development of a product, when a tying arrangement may have been considered permissible for a new business to break into the market.[31] However, as shown in *Jerrold*, once the marketplace has developed, the tying arrangement of tying service to equipment sales was no longer justified.[32]

"Interbrand competition is the competition among the manufacturers of the same generic product - television sets in this case - and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors - wholesale or retail - of the product of a particular manufacturer.

The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product."

[31]See *Jefferson Parish*, 466 U.S. 2, 24, footnote 39, discussing *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545 (ED Pa.1960), aff'd (*per curiam*), 365 U.S. 567 (1961) ("*Jerrold*"), in which the majority stated, ". . . *Jerrold* also indicates that tying may be permissible when necessary to enable a new business to break into the market. See *id.*, at 555-558."

[32]Judge Van Dusen addressed this issue at 187 F.Supp. 558, as follows:

". . . It is content to say that, while Jerrold has satisfied this court that its policy was reasonable at its inception, it has failed to satisfy us that it remained reasonable throughout the period of its use, even allowing it a reasonable time to recognize and adjust its policies to changing conditions. [footnote omitted] Accordingly, the court concludes that the defendants' refusal to sell Jerrold equipment except in conjunction with a service contract violated § 1 of the Sherman Act during part of the time this policy was in effect. [footnote omitted]"

C. The Theory of Interbrand Competition Is Inapplicable When a Company Is the Sole Source of Its Aftermarket Parts

It is undisputed that many of the aftermarket parts for Kodak copiers are unique and only available from Kodak (Pet.App. 7A, 11A).[33]

If these parts were patented, the tying of other products to the sale of the patented part would be unlawful.[34]

Similarly, when a seller offers a unique product that competitors are not able to offer, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate.[35]

This condemnation of conduct related to "unique parts" which are not under a patent has not been withdrawn.

The primary cases cited by Kodak in support of interbrand competition do not refer to a unique product which could not be substituted, such as Kodak parts.[36]

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[33]Further, Kodak prevented ISOs from obtaining parts, as shown earlier.

[34]See *Jefferson Parish*, 466 U.S. at pp. 15-17 and cases cited therein, which discuss per se condemnation, the foreclosure of a substantial volume of commerce, and the unlawful existence of a patent monopoly.

[35]*Jefferson Parish*, 466 U.S. at pp. 17-19 and cases cited therein. See also p. 37, footnote 7, wherein O'Connor, J., concurring, states that the uniqueness factor might only help to give market power to a seller.

[36]In *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983) ("*Philips*"), Philips would not provide warranty protection and service to computer owners who did not use the magnetic cards (MLC). The Court found, at p. 977, that

In the present case, the uniqueness of Kodak's replacement parts (the tying product) may trigger a presumption of market power. Physically the parts are unique and economically they are unique in that they are unavailable from other sources.

D. An Extension of the Definition of the Product Markets or the Relevant Market Is Not Appropriate

Kodak has not presented any reason or necessity to change the definition of the product markets or the relevant market in tying arrangement cases to extend such to encompass a market for an untied product, i.e. original equipment.

Philips did not have power to "raise prices or to require purchasers to accept burdensome terms that could not be enacted in a completely competitive market" [citation omitted] in the tying product (service).

In *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 799 (1st Cir. 1988) ("*Grappone*"), in which automobiles were tied to parts, the Court found that Subarus (the tying product) did not have any special or unique features such as patents or copyrights that might demonstrate market power.

In *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986) ("*A.I. Root*"), the Court held that substitute products existed for the tying product, reconfigured BOSS software, which was copyrighted.

In a case in which the parts were conceded to be unique, *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228 (7th Cir. 1988) ("*Sterling*"), *cert. denied*, 110 S.Ct. 141 (1989), Sterling replacement parts (the tying product) were conditioned upon the purchase of a quota of Sterling motors (the tied product). Sterling had conceded that its replacement parts (the tying product) were unique (p. 232-233). The Court refused to reconsider the previous panel's interpretation of *Jefferson Parish* which was that physical uniqueness triggers the presumption of market power. Judge Posner, however, in his dissent rejected the effects of uniqueness based upon Sterling's small market share in the market for motors (the tied product) (p. 236).

The effect of any such extension would allow manufacturers to monopolize competitive aftermarkets which are related to their original equipment with impunity.

In essence, one can expect the service of automobiles to be monopolized by automobile manufacturers and their franchised dealers based upon the manufacturers' prohibition of selling parts, either directly or indirectly, to other service providers; the service of computers and high tech equipment to be monopolized by manufacturers based upon their refusal to sell parts to anyone other than the owners, who will not be allowed to resell such parts to TPMs; and the service of the consumer electronics industry's products to be monopolized by the manufacturers of such items, based upon their refusal to sell parts to anyone other than the consumer, who will not be allowed to resell such parts to TPMs.[37]

These prohibitions may be enforced by "boycott like" conduct similar to that presented by the record in this case, in which the third party manufacturers of the parts, the customers, and the brokers are precluded from selling such parts to TPMs to service equipment and products.

---

[37]It is evident from even the limited state of the record that the Court of Appeals was correct in its decision to reverse the order of dismissal of the Trial Court. The theory that Kodak lacks market power in interbrand competition and therefore cannot engage in an unlawful tying arrangement or monopolistic conduct in the aftermarkets of parts and service, when viewed against the reality of the marketplace does not render Respondent's claims as implausible. Nor should Respondents be placed with the burden to "come forward with more persuasive evidence to support their claim than would be necessary." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("*Matsushita*").

The extension of the *Matsushita* burden to cases in which discovery has either been denied or truncated will have the effect of stifling the proper resolution of many valid claims.

The effect of this activity would be the disappearance of the competitive service industry and all of its price and efficiency benefits to consumers.

VI.

CONCLUSION

The case herein presents one of the most pressing issues with respect to the future direction of the United States economy, which is now service oriented. If the theory that a manufacturer may control the aftermarket of parts and service in its original equipment, to the exclusion of all viable competition prevails, the effect upon the United States economy will be drastic in both the immediate and the long-term future. Competition will vanish, productivity will diminish, efficiency will drop, prices will rise, and the general welfare of the consumer will irreparably suffer.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on September 20, 1991, I served the within *Brief of Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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No. 90-1029

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ELECTRONICS SALES AND SERVICE DEALERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF NATIONAL ELECTRONICS SALES AND SERVICE DEALERS ASSOCIATION IN SUPPORT OF RESPONDENTS

I. INTEREST OF *AMICUS CURIAE*[1]

The National Electronics Sales and Service Dealers Association ("NESDA") is a trade association for the professionals in the business of servicing all types of electronics products, including consumer products, appliances, satellite receiving equipment, computers, and

[1] Counsel of record have consented to the filing of this *amicus* brief and those letters have been filed with the clerk pursuant to Supreme Court Rule 37.

medical and industrial electronic equipment. The consumer products its members service include radios, televisions, and video equipment. The National Alliance of T.V. & Electronics Association, from which NESDA grew, was founded in 1950.

Its membership, 875 in total, is comprised of owners and managers of independent electronic service businesses and sales operations. The members range from one-man shops to large, multi-location businesses.

NESDA's purpose is to improve its members' businesses through information sharing and cooperation. NESDA helps members cope with escalating demands of business management and keep pace with changes in technology. It also helps members to recognize and meet the changing needs of the consumer.

NESDA has associate organizations in fourteen states: Arizona, California, Connecticut, Florida, Kansas, Massachusetts, Missouri, New York, Ohio, Oregon, Tennessee, Texas, Virginia and Wisconsin. These organizations include thousands of other state and local association members. Each local or regional chapter works independently to serve the local association member within its own area. The affiliated organizations combine with NESDA to provide member benefits on a national scale and to assess industry and association problems.

The International Society of Certified Electronics Technicians ("ISCET") is also part of NESDA. ISCET was founded in 1970. ISCET members are employed technicians, smaller business owners or managers, and electronics instructors. They service a full spectrum of

products, from engineering to military, but their primary focus is on electronics.

ISCET members service radios, phonographs, tape recorders, compact disc players, audio high-fidelity equipment, televisions, audio-visual units, antennae, 2-way communications radios, public address and background sound systems, computers, and peripheral equipment, among other electronic products. There are 1,750 members of ISCET, which brings the combined membership of the two organizations to approximately 2,600. ISCET's purpose is to further professionalism in servicing and to improve the status of electronics technicians.

Becoming a professional electronics technician requires a substantial investment by the technician or his employer in tools, service literature, test equipment and service aids. Up to two years of technical training in electronics plus two to four years of on the job experience are required to become a fully qualified service technician. This rigorous training, however, is not by itself enough to qualify a service technician for membership in ISCET. Only electronics technicians who have passed a special exam are eligible to apply for membership.

Both NESDA and ISCET would be severely impacted by a decision in this case favoring Kodak. If Kodak is permitted to prevent independent service organizations ("ISOs") access to Kodak parts, the likelihood is very great that other manufacturers will follow suit. Access to parts is critical to an organization that services a particular manufacturer's product. Without parts it is impossible to repair electronics products.

Kodak's chief argument in this case is that because Kodak has no monopoly over the sale of a type of product, *i.e.*, copiers and micrographics equipment, then it follows that Kodak cannot have market power with respect to service, even if no other company can compete for repairs on Kodak's brand of equipment. According to Kodak, other companies are not competent to service Kodak's high-tech equipment, so the service of Kodak's equipment must be limited to Kodak.

This argument is factually incorrect. NESDA has been in existence effectively since 1950, and ISCET since 1970. It defies logic that the thousands of businesses which are members of these organizations are not competent to service high-tech equipment. Their very existence for such a long period of time refutes this argument. It would not be possible for these businesses to survive in a competitive marketplace unless their services were comparable to, if not better than, the manufacturer's.

The members of these long-standing organizations will be forced out of business if Kodak and other manufacturers are permitted to monopolize the parts necessary to service their equipment. In most cases there is no alternative means to obtain the parts; the manufacturer is the sole source. Without parts and service literature, members of NESDA and ISCET will be driven out of business in a matter of months.

If this Court rules that Kodak may vertically integrate and refuse to sell parts to ISOs, then many other manufacturers, even those which now favor using ISOs, will be unable to resist the lure of a service monopoly. By

maintaining a strangle hold on parts and service manuals, a manufacturer will be able to charge higher prices to consumers who will have no alternative to manufacturer-supplied service.

II. SUMMARY OF ARGUMENT, ARGUMENT, CONCLUSION

NESDA and ISCET join in the Summary of Argument, Argument and Conclusion of the brief filed by Computer Service Network International as *amicus curiae* in this case.

Respectfully submitted,

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